85-601

No.____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PALMORE CURREY, II,

Petitioner,

VS.

FREIDRICH WILHELM WAFFENSCHMIDT
and ANNA WAFFENSCHMIDT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

First, may a resident citizen of Texas be held guilty of civil contempt in a summary proceeding for violation of a temporary restraining order ("TRO") issued by a Uunited States District Court in Mississippi where: (1) he had no contacts with the State of Mississippi which would subject him to "traditional in personam jurisdiction";[1] (2) was not a party to, could not have been made a party to the underlying action, and had no connection with or participation ion the securities fraud which was its subject; and, (3) all of the acts upon which the civil contempt is based took place in Texas?

Stated another way, may a district court punish a non-party for civil contempt where it did not have and could not acquire personal jurisdiction?

Second, whether the holdings of both the Court of Appeals and the District Court rest upon the presumption of *Dyer v. MacDougall*,[2] conflicting with the holdiong of *Nishikawa v. Dulles?*[3]

Third, whether the Court of Appeals' holding, *sua sponte*, that the District Court had jurisdiction under the Mississippi long-arm statue conflicts with the holding of *International Shoe Co. v. Washington*[4] and its progeny?

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[1]*Waffenschmidt v. MacKay*, 763 F2d 711 (5th Cir., 1985), at 715, 717, and 722. "Traditional" in personam jurisdiction is, of course, limited by the "traditional" Constitution.

[2]201 F2d 265 (2nd Cir., 1952). The *Dyer* holding is that the demeanor of a witness who has a motive to deny may justify a belief that not only is his testimony not true, but that the truth is the opposite of the witness' story.

[3]356 US 129 (1958).

[4]326 US 310 (1945).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
PETITION FOR A WRIT OF CERTIORARI	1
OPINION BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS	2
STATEMENT OF THE CASE	4
The Underlying Action	4
Contempt Proceedings against Petitioner	6
Petitioner's Version of His Transaction with MacKay	6
Proof of Respondents of Petitioner's Actual Knowledge of the TRO or PI	8
REASONS FOR GRANTING THE WRIT	8
The Jurisdiction Issue	8
Application of the *Dyer v. MacDougall* Rule	10
Application of the Mississippi Long-Arm Statute	12
CONCLUSION	14
CERTIFICATE OF SERVICE	15
APPENDIX A, THE OPINION BELOW	1a
APPENDIX A-1, ORDER DENYING REHEARING	30a
APPENDIX B, MEMORANDUM OF DECISION OF THE DISTRICT COURT	32a
APPENDIX C, SEVENTH AMENDMENT	44a

TABLE OF AUTHORITIES

CASES — Page

Dyer v. MacDougall, 201 F2d 265 (2nd Cir, 1952) .... i, 10
Heyman v. Kline, 444 F2d 65 (2nd Cir., 1971) 9
International Shoe Co. v. Washington, 326 US 129 (1945) ..... i, 9, 14
Mitsugi Nishikawa v. Dulles, 235 F2d 135 (9th Cir., 1956) 10
Nishikawa v. Dulles, 356 US 129 (1958) ..... i, 10
Prejean v. Sontrach, Inc., 652 F2d 1260 (5th Cir., 1981) . 12
Shaffer v. Heitner, 433 US 186 (1977) 9
Stiller v. Hardman, 324 F2d 626 (2nd Cir., 1963) 9
Waffenschmidt v. MacKay, 763 F2d 711 (5th Cir., 1985) ..... i, 1, 11
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 US 100 (1969) 9

ORGANIC LAW

Seventh Amendment, Constitution of the United States 2, 8
Declaration of Independence 9

STATUTES

§ 13-3-57, Mississippi Code of 1972 ..... 2, 13
15 USC §§ 77l, 77q(a), and 78j(b) 5
28 USC § 1254(1) 2
28 USC § 1391(a) 2, 8
18 USC §§ 1962, et seq. 5

MISCELLANEOUS

17 CFR § 240.10b- 5 5
Federal Rules of Civil Procedure:
Rule 4(e), (f) 3, 13
Rule 82 4

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FREIDRICH WILHELM WAFFENSCHMIDT
and ANNA WAFFENSCHMIDT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully requests the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case dated June 21, 1985.

OPINION BELOW

The opinion of the Court of Appeals, dated June 21, 1985, reported at 763 F2d 711 (5th Cir., 1985), is reproduced as Appendix A. The Order denying Petition for Rehearing and Suggestion for Rehearing En Banc, dated August 5, 1983, is reproduced as Appendix A-1. The Memorandum of Decision of the United States District Court for the Northern Dis-

trict of Mississippi, dated December 9, 1983, is reproduced as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1985. Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 5, 1985. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS

The constitutional provision involved is the Seventh Amendment to the Constitution of the United States, reproduced as Appendix C.

The relevant portions of statutory provisions involved are quoted below:

> 28 USC § 1391. **Venue generally**
>
> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.
>
> § 13-3-57, Mississippi Code of 1972:
>
> "Any nonresident person * * * who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed equivalent to the appointment by such nonresident of the secretary of state of the State of Mis-

sissippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceedings accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their or its agent, servant or employee. * * *"

The relevant portions of Federal Rules of Civil Procedure, are quoted:

Rule 4. Process

(e) Summons: Service upon Party Not Inhabitant of or Found Within State. * * * Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, * * * service * * * may be made under the circumstances and in the manner presribed in the statute or rule.

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or a cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and

persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the juridiction of the United States district courts or the venue of actions therein.

STATEMENT OF THE CASE

The Underlying Action

Respondents, Freidrich Wilhelm and Anna Waffenschmidt, are resident citizens of Cologne, Federal Republic of Germany. Jack W. MacKay, Jr., was then a resident of the State of Mississippi and the owner of a farm in Lowndes County.[5] During 1982, a prospectus was prepared grossly overstating the value of the farm, its equipment, crops and inventories, and earnings history. Sunburst Farms, Inc., was organized by MacKay to take title to the farm, inventories, etc. In reliance upon these misrepresentations, respondents purchased the corporation from MacKay and his co-conspirators for a substantial sum of money, of which MacKay received some $4.5 millions. The entire thrust of the contempt proceedings was to recover proceeds of respondents' assets (paid to MacKay in reliance on his fraud) in which Sunburst Farms, Inc., has no identifiable interest. For that reason, this corporation is not named as a respondent.

On March 9, 1983, respondents (and Sunburst Farms, Inc.) commenced an action against MacKay and his co-conspirators in the United States District Court for the

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[5]MacKay moved to Texas during December, 1982.

Northern District of Mississippi seeking recission and damages (the "underlying case"). Subject matter jurisdiction in the case rested on securities fraud and RICO claims,[6] with pendent state claims of common law fraud.

The District Court issued a TRO on March 16, 1983, which enjoined MacKay and "all persons acting in concert" with him from:

> "[t]ransferring, concealing, or disposing of any funds received by them from [respondents], or any property acquired with such proceeds . . . [or] permitting the concealment, transfer, disposal, secreting, dissipation, or encumbering of such assets; provided, however, that this order shall not preclude [those subject to this order] . . from carrying on or engaging in the usual and ordinary conduct of business. . . ."

With the consent of the defendants (but not of petitioner), the TRO was extended to midnight, May 24, 1983. On May 27, after a three-day hearing (in which petitioner did not participate), the District Court granted a preliminary injunction ("PI") which continued the interdictions of the TRO and directed MacKay to pay $430,000 of the fraudulent proceeds into court. MacKay had purchased T-notes with the proceeds of his fraud in the face amount of $400,000 with $33,500 in attached coupons which he had negotiated or encumbered some time between March and May of 1983, in Texas, to: petitioner, $103,500; D & K Motor Sports, Inc. and/or its owner, Kendall Johnson, $100,000; and First National Bank of Mount Vernon, Texas, $230,000. None of these transferees were parties to the underlying action.

Because of these transactions, MacKay was unable to comply with the PI, and following a hearing July 23, 1983,

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[6]15 USC §§ 77l, 77q(a) and 78j(b); 17 CFR § 240.10b-5; and 18 USC §§ 1962, et seq.

he was found guilty of civil contempt and jailed on August 22 until he complied. On November 10, MacKay was released from jail for the reason further incarceration would be punitive.

Contempt Proceedings against Petitioner

On November 14th, the District Court, at the instance of respondents, issued an order served in Texas requiring petitioner and the others to show cause at Greenville, Mississippi, on December 2nd (18 days) why they were not in contempt of the TRO and the PI. Petitioner moved under Rule 12(b)(4), Federal Rules of Civil Procedure, to dissolve the show cause order for lack of jurisdiction. At the hearing held December 2nd, petitioner made a special appearance to contest jurisdiction. The District Court found petitioner in civil contempt, levied a compensatory fine in the amount of $103,500, plus attorneys' fees and expenses in the amount of $6,840.09. His appeal to the United States Court of Appeals for the Fifth Circuit under 28 USC § 1291 was timely perfected, and certiorari is sought on its affirmance.

Petitioner's Version of His Transaction with MacKay

Petitioner's evidence, totally disregarded by the District Court,[7] was simply that he had been in the hotel business since 1964, except for ownership of an automobile agency during 1969–70, and that the Holiday Inn at Mt. Pleasant, Texas, had been owned by a family corporation since 1977. He owned 55% of the stock, his wife 5%, and each of his two children 20%. It had owned the Paris, Texas, Holiday Inn, sold about four years before his testimony. In his deposition taken July 12, 1983, and in his testimony, he had met MacKay about 18 months before, had had discussions about the sale of an airplane hangar (which never materialzied),

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[7]Undoubtedly, petitioner was heavily tarred with MacKay's brush.

knew him as a customer of the Holiday Inn, and began discussions during the latter part of 1982 concerning a possible sale of the Mount Pleasant Holiday Inn.

During the early part of 1983, petitioner and MacKay entered into a verbal agreement for the sale and purchase of the Mount Pleasant Holiday Inn for $2.7 million under which the latter was to pay petitioner $100,000 on March 1st as earnest money, the balance, less the earnest money and assumable mortgages, to be paid in cash on June 1st.

Pursuant to this agreement, MacKay delivered petitioner a $100,000 T-note with one $3500 coupon attached sometime in March, 1983. Unknown to petitioner, this T-note was one of several purchased by MacKay with proceeds of his fraud. Petitioner could not fix the date of this delivery, but knew it was late and believed it was sometime between March 1st and 10th. At the time, petitioner knew nothing of the underlying action.

Petitioner did not discuss the verbal agreement with anyone, as he stated, because he did not know whether the transaction would be completed or not. He did not feel the necessity of a written contract, because he had the $100,000. If MacKay came up with the balance, he had a good sale; if not, he had the $100,000 T-note.

Petitioner was later advised by MacKay that the latter would not be able to complete the purchase. Petitioner regarded the T- note as his property, sold it sometime around the end of September or early October, deposited the proceeds in his bank, and spent it on major renovations to the Holiday Inn.

Petitioner's first knowledge of the underlying action or of the fact that T-note was part of proceeds of MacKay's fraud on respondents was received when his deposition was

taken, July 12th. He received a copy of the TRO and PI by certified mail on July 14th. He had never heard of the respondents prior to his deposition.

Proof by Respondents of Petitioner's Actual Knowledge of the TRO or PI

Respondents showed only that petitioner was advised of the TRO and PI at his deposition in Texas on July 12, 1983; that copies were sent him by certified mail received July 14th; that petitioner refused to surrender the T-note, asserting that it was his property; and argued that petitioner was "in cahoots" with MacKay. There is no evidence in the record that petitioner had any knowledge of the TRO at the time the T-note was delivered to him, nor is there any evidence he had any notice of its extension by consent of the parties.

REASONS FOR GRANTING THE WRIT

The Jurisdictional Issue

This case squarely presents the issue of whether a District Court is bound by constitutional limitations in seeking to enforce its injunctions against non-parties who are not subject to its jurisdiction, and who are not subject to its process.

Although cast as a civil contempt proceeding, the basic controversy is over a $100,000 U.S. Treasury note with a $3,500 coupon attached (the "T-note"), negotiated to petitioner in Texas by Jack W. MacKay, Jr., a defendant in the underlying action. The T-note was part of the proceeds of MacKay's fraud practiced upon respondents. Petitioner claimed title to the T-note. Trying title to this T-note in a summary proceeding, deprived petitioner of benefits of venue,[8] deprived him of his fundamental right to trial by jury,[9]

[8]28 USC § 1391(a).

[9]Seventh Amendment, Constitution of the United States, Appendix C, p. 44a.

and smacks of "transporting [him] beyond Seas."[10]

Since petitioner did not in any way participate in the acts which are the subject of the underlying case, the District Court cannot assert jurisdiction under the securities laws or under the RICO statutes *as to him*. Looking at diversity jurisdiction, the respondents are German nationals and do not reside in Mississippi. Consequently, under 28 USC § 1391(a), petitioner could only be sued in Texas, where he resides and where the claim arose.

It is clear petitioner asserted an independent interest in the T-note. The question here is not whether petitioner did or did not have such an interest; the question is whether the Mississippi court had *power* under the Constitution of the United States to haul a citizen across three states and adjudicate that question in a summary proceeding where: (1) the citizen was not a party to the underlying action and had not been served with process in the Mississippi court; and (2) where the citizen had had no contacts with the state of Mississippi which would support jurisdiction under prior decisions of this Court.[11]

Whether a district court has nationwide jurisdiction to enforce its orders against persons not parties to the action before it and otherwise subject to its jurisdiction is an important question of federal law which has not been, but should be, settled by this Court.[12] This question requires a

[10]Declaration of Independence, 1 USC at page 4.

[11]On (1), *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 US 100 (1969); On (2), *Shaffer v. Heitner*, 433 US 186 (1977); and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The district court lacked power to adjudicate an independent interest asserted by a non-party over whom it lacked personal jurisdiction. *Heyman v. Kline*, 444 F2d 65 (2nd Cir., 1971).

[12]We do not dispute the proposition that a district court has nationwide jurisdiction to enforce its order against *parties* subject to its jurisdiction [*Stiller v. Hardman*, 324 F2d 626 (2nd Cir., 1963)]; we vigorously contest the proposition that it has the same jurisdiction over *non-parties* otherwise beyond the reach of its process.

delicate balance to be struck between the rights of the non-parties, and the convenience of the parties to the underlying action. Respondents can, of course, sue petitioner in Texas.

Application of the *Dyer v. MacDougall* Rule

As Judge Learned Hand himself pointed out,[13] the *Dyer* rule is dangerous. A witness' "demeanor" is not part of the record. An appellate court cannot determine whether the trial court was right or wrong, and the trial judge thus becomes the final arbiter, effectively denying a party due process since there can be no meaningful appeal.

We understand the *Nishikawa* rule to be that on appellate review, the witness' testimony is to be disregarded; on the *remaining* evidence, the question is whether respondents carreid the burden of proof by "clear and convincing" evidence showing petitioner had actual notice of the TRO *at the time* the T-note was negotiated to him.

This case is in the same posture before this Court as the appeal in *Nishikawa v. Dulles*, 356 US 129 (1958). In *Mitsugi Nishikawa v. Dulles*, 235 F2d 135 (9th Cir., 1956), the Ninth Circuit said:

> "Neither the facts found by the District court nor the inferences from those facts can be set aside by this Court unless 'clearly erroneous'. The record here *amply supports* the conclusion of the lower court that the act of plaintiff in entering the Japanese army was a voluntary act." [Emphasis added.]
>
> 235 F2d at 141.

In the case at bar, the Court of Appeals said:

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[13]201 F2d at 169.

> "To the extent these facts relate to the district court's findings concerning the appellants, Currey, Johnson, and the Bank, we construe the evidence in a light most favorable to upholding the court's verdict [sic]."
>
> 763 F2d at 714.

After discussing, in detail, *only* the testimony of petitioner, the Circuit Court went on,

> "Currey [petitioner] ignores, however, *the abundance of other proof* the district court could have relied on to find that the alleged hotel sale was mere pretense." [Emphasis added.]
>
> 763 F2d at 724.

Absent petitioner's testimony, there is absolutely no evidence in the record he had actual notice of the TRO until July 12, 1983, when his deposition was taken. This is a far cry from the facts as stated in the Court of Appeals' opinion.

This case is a graphic illustration of what can (and did) happen. On less than 18 days' notice, petitioner was dragged by the nape of his neck, out of the community where he resided and was known, through Texas, across Arkansas, into Mississippi, and haled before a strange judge in a case to which he was not a party and with which he had no connection. Deprived of a jury trial on the question of whether he had received the T-note without notice of the TRO, this strange judge, already convinced MacKay was an out-and-out crook, proceeded to disregard petitioner's testimony, conclude that the truth was its exact opposite, and to levy a "compensatory fine" against him for $110,340.09.

There is something wrong with this scenario.

Application of the Mississippi Long-Arm Statute

The District Court found as a fact:

> "None of the respondents [petitioner included] has transacted business or owned assets within the State of Mississippi which would subject any of them to the in personam jurisdiction of this Court."
>
> Appendix B, page 33a.

This finding was not contested on appeal, but the Court of Appeals undertook, *sua sponte*, to hold that petitioner purposefully engaged in activities outside Mississippi that would have the foreseeable and intended result of dissipating assets subject to marshalling in that forum. It held:

> "The jurisdictional issue turns squarely on the consequences which their acts had in Mississippi. The court is not trying to assert general in personam jurisdiction over these respondents for causes of action unrelated to their actions; it is merely holding them responsible for the intended consequences which their nonforum activities had on the subject matter of the court's order."
>
> Appendix A, p. 19a; 763 F2d at 723.

Curiously enough, the Court of Appeals relies on *Prejean v. Sontrach, Inc.*, 652 F2d 1260 (5th Cir., 1981). There, widows of two engineers killed in an aircraft crash in Algeria sued their employer, the aircraft manufacturer, and Air Algerie, the owner of the aircraft, using the Texas long-arm statute. As in the case here, Air Algerie had had no contacts with Texas. The case was dismissed as to the manufacturer and Air Algerie. As to the latter, the court held

> "With respect to Air Algerie, the intangible tortious injury to the Texas plaintiffs is the only contact this

> defendant is alleged to have with Texas. This contact did not satisfy the statutory nexus requirement. Even if it did, however, assertion of jurisdiction solely on the basis of this single fortuitous contact with Texas would violate the strictures of due process. The economic effects from the alleged tortious conduct were not purposefully introduced into Texas, but were only fortuitous impacts on the survivors, wherever they were located, from the wrongful acts against the decedents. Without the necessary factor of purposeful creation of the effects, the assertion of in personam jurisdiciton is unconstitutional."
>
> 652 F2d at 1269-70.

In the case at bar, the fact the TRO was issued by a district court sitting in Mississippi was "fortuitous"; it could have been sitting in New York, California, or wherever.

The Court of Appeals' holding will not withstand scrutiny. The T-note (as negotiable as a $10 bill) was physically beyond the Mississippi court's jurisdiction. The economic impact of its negotiation to petitioner falls on respondents, German nationals and not residents of Mississippi. Rightly or wrongly, petitioner claimed title to the T-note; his refusal to surrender it to respondents would place him on notice that he might be sued, but in Texas, not Mississippi. The negotiation took place in Texas, not Mississippi. § 13-3-57, Mississippi Code of 1972, *supra*, available for jurisdictional purposes under Rule 4(e), Federal Rules of Civil Procedure, *supra*, authorizes service of process on the Secretary of State as petitioner's agent for service of process, but not direct service of a fiat on petitioner in Texas, and does not confer summary jurisdiction over a non-party such as that exercised by the Mississippi court. Petitioner was beyond the geographical limits on the Mississippi

court's process imposed under rule 4(f), Federal Rules of Civil Procedure.[15]

The ruling goes well beyond the limits of *International Shoe* and its progeny.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion and judgment of the Fifth Circuit.

Dated this 7th day of October, 1985.

Respectfully submitted,

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[15]Rule 4(f) provides, "and persons require to respond to an order of commitment for civil contempt may be served at the same places." We ask: if the Mississippi court may not go beyond Rule 4(f) limits to *commit* for civil contempt, how can it exceed those limits to *adjudicate* civil contempt?

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing instrument were forwarded via United States mail, postage prepaid, to Mr. James Schreiber, SCHWARTZ, KLINK & SCHREIBER, 666 Third Avenue, New York, NY 10017, counsel for respondents.

Dated this 7th day of October, 1985.

/s/_____
J. Robertshaw

APPENDIX

APPENDIX A

Opinion of the

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRIEDRICH WILHELM WAFFENSCHMIDT, ET AL., PLAINTIFFS-APPELLEES-APPELLANTS

Cross-Appellees,

V.

JACK W. MACKAY, JR., *et al.*,

Defendants,

PALMORE CURREY, II, *et al.*,

Appellants,
Cross-Appellees,

FIRST NATIONAL BANK OF MOUNT VERNON, TEXAS,

Appellee, Cross-Appellant,
Cross-Appellee.

No. 84- 4012.

United States Court of Appeals, Fifth Circuit.

June 21, 1985.

Appeals from the United States District Court for the Northern District of Mississippi

Before CLARK, Chief Judge, GARWOOD, and HILL, Circuit Judges.

CLARK, Chief Judge:

I

Nonparties who reside outside the territorial jurisdiction of a district court may be subject to that court's jurisdiction if, with actual notice of the court's order, they actively aid and abet a party in violating that order. This is so despite the absence of other contacts with the forum. We, therefore, affirm the judgment of the district court, holding that three of the respondents, D & K Motor Sports, Inc. ("D & K"), its owner, Johnson (collectively referred to as "Johnson"), and Currey were in contempt of court. We affirm the holding that a fourth respondent, the First National Bank of Mount Vernon, Texas ("the Bank"), did not aid or abet the defendant. We also affirm the court's rulings concerning attorney's fees and pretermit any ruling on the order permitting substitution of collateral for Johnson's supersedeas bond.

II

This appeal is the culmination of a series of proceedings directed toward halting the dissipation and secretion of assets that are the subject of the underlying suit. For the purposes of this appeal, to the extent that these facts relate to the events between MacKay and the Waffenschmidts, which are the subject of ongoing proceedings in the district court, we will assume as true the facts as stated in the Waffenschmidts' complaint. To the extent these facts relate to the district court's findings concerning the appellants, Currey, Johnson, and the Bank, we constue the evidence in a light most favorable to upholding the court's verdict. *See Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942).

The Waffenschmidts paid MacKay $4.5 million for stock in a Mississippi corporation and subsequently sued him for securities fraud. The court issued a temporary restraining order (TRO) on March 16, 1983, which enjoined MacKay and "all persons acting in concert" with him from:

> [t]ransferring, concealing, or disposing of any funds received by them from [the Waffenschmidts], or any proper-

> ty acquired with such proceeds . . . [or] permitting the concealment, transfer, disposal, secreting, dissipation, or encumbering of such assets; provided, however, that this order shall not preclude [those subject to this order] . . . from carrying on or engaging in the usual and ordinary conduct of businesses. . . .

The court extended the TRO through May 24, 1983. On May 27, after a three day hearing, the court granted a preliminary injunction which continued the interdictions of the TRO and also required MacKay to pay $430,000 of the proceeds from the stock sale into the court.

MacKay was unable to deposit these funds with the court because he had transferred them in the form of United States Treasury Notes with attached interest coupons to Currey ($103,500), Johnson ($100,000), and the Bank ($230,000) during the spring of 1983. These respondents independently received the proceeds in Texas sometime between March and June.

The court commenced a hearing on July 23, requiring MacKay to show cause why he should not be held in contempt. During the course of this hearing, plaintiffs deposed Currey, Johnson, and the Bank's president, Greer. The court found MacKay guilty of civil contempt and ordered him jailed on August 22 until he complied with the court's order. MacKay remained in jail until November 10, at which time the court released him on the ground that further incarceration would be punitive.

Meanwhile, the Waffenschmidts had attempted to retrieve these funds from Currey, Johnson, and the Bank. On March 21, 1983, plaintiffs served the Bank with a copy of the TRO, and on March 25 with notice of its extension. The bank received a copy of the preliminary injunction on July 25. Currey and Johnson received copies of the TRO and preliminary injunction shortly after their depositions in July. The Waffenschmidts sent each respondent a copy of the Order of Contempt against MacKay by September 2.

Following the release of MacKay, the court issued an order on November 14 to Currey, Johnson, and the Bank to show cause why they were not in contempt. The court also ordered them to turn over the proceeds they had received from MacKay. These respondents moved to quash the order, alleging lack of jurisdiction among their defenses.

The court held a hearing on December 2, and Currey, Johnson, and the Bank entered special appearances to contest the court's jurisdiction. MacKay, Currey, Johnson, and Greer testified and had full opportunity to present evidence to support their positions. The court found that none of these respondents had contacts within Mississippi to subject them to traditional in personam jurisdiction. It found, however, that Currey and Johnson had notice of the court's orders, acted as agents, servants, and/or employees of MacKay, and acted in active concert and participation with him in dissipating the stock proceeds.

The court thus held that they were subject to the court's jurisdiction as persons enjoined by the court's order. Upon evaluating all the evidence presented at the hearing, the court found Currey and Johnson in contempt and imposed compensatory fines on Currey for $110,340.09 and on Johnson for $106,840.09. These amounts included a $6,840.09 award of attorney's fees against each.

In contrast, the court found that while the Bank had received notice of the TRO and acted negligently in its transactions with MacKay, it had not acted as MacKay's agent in active concert or participation with him. Therefore, the court held it lacked jurisdiction over the Bank, and could not hold it in contempt. The court declined to award either the Bank or the Waffenschmidts attorney's fees against the other party.

Currey and Johnson filed timely notice of appeal. The Waffenschmidts cross-appealed, seeking a civil contempt order and attorney's fees against the Bank. The Bank also cross appealed, petitioning for attorney's fees against the Waffenschmidts. Finally, upon application of Johnson, the court

allowed him to pledge approximatley $31,000 worth of boats, motors, and trailers to serve as security pending this appeal, in place of the traditional supersedeas bond for the full $106,840.09. The Waffenschmidts also appeal this substitution.

III

Currey, Johnson, and the Bank assert that the District Court for the Northern District of Mississippi lacks jurisdiction to hold these Texas residents in contempt of court. The court held that the respondents lacked sufficient contacts to exercise traditional in personam jurisdiction over them. None were named as parties in the underlying suit or had any contacts with Mississippi, and all lived beyond the territorial limits for service of process as prescribed in Fed. R.Civ.P. 4(f).

Currey and Johnson contend that the court's action in holding them in contempt violates *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), requiring that before a court may assert jurisdiction over a person, the person must have sufficient minimum contacts with the forum such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316, 66 S.Ct. at 158, *quoting*, *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940).

The district court evaluated jurisdiction of Currey, Johnson, and the Bank pursuant to Fed.R.Civ.P. 65(d), which states in pertinent part:

> Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

We must determine whether knowing violation of a court's injunction order by the agent of a party who aids and abets that party's violation of the order permits jurisdiction when no other contacts exist with the forum. We conclude that such

jurisdiction is necessary to the proper enforcement and supervision of a court's injunctive authority and offends no precept of due process.

A

At the outset of our analysis, we note that the court exercised two types of jurisdiction. Only the second type is contested in this appeal.

Initially, the court asserted jurisdiction to determine whether it had personal jurisdiction of the parties. The power of a court to exercise this preliminary jurisdiction is well settled, and respondents do not dispute that the court had such authority. *See United States v. United Mine Workers*, 330 U.S. 258, 293, 67 S.Ct. 667, 695–96, 91 L.Ed. 884 (1947); *Familia de Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134, 1137 (5th Cir.1980); *Atlantic Las Olas, Inc. v. Joyner*, 466 F.2d 496, 498 (5th Cir.1972); 13 Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction 2d, § 3536 (1984). Instead, they attack the court's determination that it had personal jurisdiction of respondents so as to properly hold Currey and Johnson in contempt. This latter finding is the subject of our further analysis.

B

Courts possess the inherent authority to enforce their own injunctive decrees. *United States v. Hall*, 472 F.2d 261, 267 (5th Cir.1972) ("Rule 65(d) as a codification rather than a limitation of courts' common-law powers, cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment."); *Berry v. Midtown Service Corp.*, 104 F.2d 107, 110 (2d Cir.1939). *Berrry* stated:

> Courts do not sit for the idle ceremony of making orders and pronouncing judgments, the enforcement of which may be flouted, obstructed, and violated with impunity, with no power in the tribunal to punish the offender. [Federal] courts, equally with those of the state, are pos-

> sessed of ample power to protect the administration of justice from being thus hampered or interfered with. Nor is this power in any wise limited by [the predecessor to 18 U.S.C. § 401].

104 F.2d at 110–11, *quoting*, *Lineker v. Dillon*, 275 F. 460 (D.N.D.Cal.1921). The mandate of an injunction issued by a federal district court runs nationwide, *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451, 52 Sup.Ct. 238, 240, 76 L.Ed. 389 (1932), and "[v]iolation of an injunctive order is cognizable in the court which issued the injunction regardless of where the violation occurred." *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir.1963).

Enforcement of an injunction through a contempt proceeding must occur in the issuing jurisdiction because contempt is an affront to the court issuing the order. *See, e.g.*, *Leman, supra*, 284 U.S. at 452, 52 S.Ct. at 240 (Disobedience constituted contempt of the court which entered the decree. . . .); *Wilson v. United States*, 26 F.2d 215, 218 (8th Cir.1928); *Bedgood v. Cleland*, 554 F.Supp. 513, 517 (D.Minn. 1982).

> [T]he power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the [ordering] court. . . . To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency. . . . [T]he sole adjudication of contempts, and the punishments thereof [belong] exclusively . . . to each respective court.

In re Debbs, 158 U.S. 564, 594–95, 15 S.Ct. 900, 910, 39 L.Ed. 1092 (1895) (citations omitted).

A court may therefore hold an enjoined party in contempt, regardless of the state in which the person violates the court's orders. *Leman*, 284 U.S. at 454, 52 S.Ct. at 241 ("This is one of the decencies of civilization that no one would dispute.") Our

research, however, has uncovered no cases which explicitly discuss whether a court may exercise jurisdiction over a nonparty that knowingly aids and abets a violation of a court's orders but lacks other contacts with the forum.

Alternative rationales support such jurisdiction. The first looks to the inherent power of the court to act, and does not rely on traditional in personam jurisdiction analysis. The second analyzes the respondents' actions under *International Shoe* and its progeny to determine whether sufficient minimum contacts exist to exercise jurisdiction over them. There being significant support under both analyses, we hold that jurisdiction was proper.

C

An injunction binds not only the parties subject thereto, but also nonparties who act with the enjoined party. *Ex Parte Lennon*, 166 U.S. 548, 555, 17 s.Ct. 658, 660–61, 41 L.Ed. 1110 (1897); *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 344 (9th Cir.1966); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930); Fed.R.Civ.P. 65(d). Rule 65(d):

> is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in "privity" with them, represented by them or subject to their control. In essence . . . defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

Regal Knitwear Co. v. National Labor Relations Board, 324 U.S. 9, 14, 65 S.Ct. 478, 481, 89 L.Ed. 661 (1945). *See also Ex parte Lennon*, 166 U.S. at 554, 17 S.Ct. at 660; *Reich v. United States*, 239 F.2d 134, 137 (1st Cir.1956), *cert. denied*, 352 U.S. 1004, 77 S.Ct. 563, 1 L.Ed.2d 549 (1957); *Alemite*, *supra* at 832.

This principle could easily be thwarted if a court could only enforce its injunctions over nonparty aiders and abetors who resided within the court's territory for service of process. The

nationwide scope of an injunction carries with it concomitant power of the court to reach out to nonparties who knowingly violate its orders. *See Ex parte Lennon*, 166 U.S. at 55, 17 S.Ct. at 660–61; *Alemite*, 42 F.2d at 832. *Cf. Wilgus v. Paterson*, 335 F.Supp. 1385, 1389–90 (D.Del.1972). MacKay's actions in this case are a paradigm of how a defendant can enlist the aid of out-of-state individuals in an attempt to frustrate the orders of the district court. When Currey and Johnson knowingly participated in his scheme to dissipate the funds they equally knowingly subjected themselves to the jurisdiction of that court.

> When . . . the respondents undertook to render this judgment nugatory and valueless by lending their aid to remove the only tangible property of the judgment debtor beyond the reach of process, they were as guilty of violating the court's order as though it had forbidden their acts in positive terms, and under well-established principles their acts constituted a contempt of the court.

Lineker, 275 F. at 470. Nothing respondents suggest persuades us to the contrary.

IV

Respondents admit that a federal court's injunction is effective anywhere within the United States, but contend this is true only as to parties over whom the court has traditional in personam jurisdiction. If the district court lacked personal jurisdiction over respondents, they argue that it also lacked power to hold them in contempt and to implicitly decide the ownership interests of the property in question. In reliance on the district court's statement that it lacked "traditional in personam jurisdiction," respondents thus conclude that the court could not cite them for contempt. To support their argument, respondents first proffer case authority and then focus on the Federal Rules of Civil Procedure.

A

Respondents first assert that *Heyman v. Kline*, 444 F.2d 65 (2d Cir.1971), controls the decision in this case. *Heyman*,

however, is clearly distinguishable from the present controversy. *Heyman* stated that if a nonparty asserts an independent interest in the subject property and is not merely acting on behalf of the defendant, then Rule 65(d) does not authorize jurisdiction over the party. In contrast, the district court found that Currey and Johnson had no independent interest in the property, and that they merely acted as agents for MacKay in dissipating the funds. As will be shown in Part VI below, the district court's findings are not clearly erroneous. The district court has the power to prevent MacKay from secreting the funds, and it also may enjoin his aiding and abetting agents. The provisions of the district court's injunction cover Currey and Johnson because they failed to demonstrate an independent interest in the property. *Heyman* fails to support respondent's argument.

Respondents also rely on *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) for the proposition that no jurisdiction lies to grant in personam relief against one not a party and not served with process. The Supreme Court stated:

> It is elementary that one is not bound by a judgment *in personam* resulting from litigation which he is not designated as a party or to which he has not been made a party by service of process. [citation omitted.] The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.

395 U.S. at 110, 89 S.Ct. at 1569, 23 L.Ed.2d at 140.

We again find no conflict between respondent's authority and our decision in this appeal. By actively aiding and abetting MacKay, Currey and Johnson placed themsleves within the personal jurisdiction of the district court. *Zenith* does not deny jurisdiction to a court whose order is so contempted. Rather, it supports our decision. This is shown by the Court's statement that under Rule 65(d), "a nonparty with notice cannot be held in contempt *until* shown to be in active concert or participation"

with an enjoined party. *Id.* at 112, 89 S.Ct. at 1570 (emphasis supplied).

The district court in *Zenith* failed to make the determination of active concert and participation in a proceeding in which the nonparty was allowed to participate. In the case at bar, the respondents were made parties to the show cause order and were given an opportunity to prove that they did not aid or abet MacKay. When the court decided that Currey and Johnson fell within the ambit of its injunction, it could then exercise jurisdiction over them and adjudicate whether they violated the court's injunction.

Currey and Johnson next contend that *Stiller, supra*, cannot be extended beyond its holding which they insist stands merely for the proposition that an injunction cannot be summarily registered in a new forum. They argue that when an injunction order is transferred into a different forum, the defendants have a right to a plenary hearing on the merits. Furthermore, respondents cite the portion of *Stiller* in which the New York court (the new forum) acknowledged that the Ohio court (the original forum that issued the injunction) lacked jurisdiction over the New York respondents who were "privies" with the enjoined party. The Second Circuit implicitly rejected this argument, however, when it stated:

> Violation of an injunctive order is cognizable in the court which issued the injunction, regardless of where the violation occurred. . . . [T]he Ohio district court had power to punish a violative infringement though the infringement took place in New York. There is therefore no such need for registration of injunctive orders as there is for registration of the money judgment.

324 F.2d at 628 (citation omitted). We agree with the Second Circuit and hold that a court may assert jurisdiction over persons who, with knowledge of the court's orders, actively aid and abet an enjoined party.

Respondents finally contend that *Panther Pumps & Equipment Co., Inc. v. Hydrocraft, Inc.*, 566 F.2d 8 (7th Cir. 1977),

conflicts with our holding. There, the district court enjoined Hydrocraft and two of its officers from infringing a patent owned by Panther Pumps. The third officer, Beck, who was not enjoined, shipped the assets to a distant state and commenced operations as a new business entity, Universal. Panther Pumps petitioned the court to hold Beck in contempt and to substitute the new corporation as a party subject to the original injunction.

The court held that it had jurisdiction to hold Beck in contempt, because as an officer of Hydrocraft, he was subject to the terms of the injunction. In contrast, the court refused to substitute Universal as a party to the original injunction because the court lacked personal jurisdiction of the new entity.

Respondents contend that the lack of jurisdiction of Universal corresponds to a similar deficiency in the present case. We disagree. The Seventh Circuit carefully noted that the district court lacked jurisdiction over Universal because only Beck had been subject to the show cause order. The district court did not make a finding that the corporation had knowingly violated the court's injunction. Therefore, the court in *Panther Pumps* could not assert jurisdiction of Universal. In contrast, the court here brought both Currey and Johnson into the show cause hearing, and specifically found the requisite knowing violation of its order. The court thus properly asserted personal jurisdiction to adjudicate its contempt orders.

B

Respondents additionally rely on the Federal Rules of Civil Procedure to support their argument. First, they contend that Rule 65(d) cannot provide jurisdiction and, in fact, prevents a court from asserting more jurisdiction than that which it already possesses. They rely on Fed.R.Civ.P. 82 for support. Rule 82 states in pertinent part, "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." Respondents thus argue that the district court could not assert

jurisdiction pursuant to Rule 65(d) unless it independently satisfied the requirements for in personam jurisdiction.

We do not rely on Rule 65(d) to extend the jurisdiction of the district courts beyond that power which the courts inherently possess. As *Regal-Knitwear* observes, Rule 65(d) merely codified the common law power of a court to enforce its own injunctions. It is that common law power coupled with the knowing, voluntary acts of Currey and Johnson rather than any power emanating from Rule 65(d) that form the basis for the district court's proper exertion of personal jurisdiction over them in this contempt proceeding.

Respondents next contend that Fed.R.Civ.P 4(f) limits the reach of a court to enforce its orders by use of civil contempt to a maximum of 100 miles beyond the forum state's borders. They rely on the portions of Rule 4(f) emphasized below:

> **(f) Territorial Limits of Effective Service.**
>
> All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served . . . *at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places.*

Respondents' reading of Rule 4(f) is too restricted. The 100 mile limitation applies to an order of commitment for civil contempt, not for an order to show cause why a party should not be held in contempt. "Rule 4(f) sets limits only on the range of service of the order of commitment, which should be carefully dis-

tinguished from the other [phases of] the contempt proceeding, . . . including the order to show cause why a party should not be held in contempt. . . ." 4 Wright & Miller, Federal Practice and Procedure, § 1129 (1969). If respondents' interpretation was correct, then a court could not issue a show cause order to a party that violated the court's orders beyond the 100 mile limit. As demonstrated earlier, however, courts clearly have the power to serve a defendant to show cause wherever the alleged contemnor currently resides. *Leman, supra*, 284 U.S. at 451, 52 S.Ct. at 240.

The Federal Rules of Civil Procedure do not expand or restrict the jurisdiction that the court otherwise possesses. *See Mississippi Publishing corp. v. Murphree*, 326 U.S. 438, 445, 66 S.Ct. 242, 246, 90 L.Ed. 185 (1946); *Vaughan v. Empresas Hondurenas*, S.A., 171 F.2d 46, 47 (5th Cir.1948); *United Office & Professional Workers of America v. Smiley*, 75 F.Supp. 695, 699 (E.D.Pa.1946); Fed.R.Civ.P. 82. Because the court had jurisdiction of Currey and Johnson as a result of their knowing and voluntary participation with the contumacious party, service of process was not prohibited by the rule 4(f).

Indeed, Rule 4(f) allows extraterritorial service if authorized by statute or "these rules." Rule 4(e) provides in part:

> Whenever a statute or rule of court of the state in which the district court is held provides . . . for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant or found within the state, . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule.

We therefore examine whether Mississippi statutory law would permit service upon these respondents, and if so, whether due process permits the exercise of that jurisdiction under the facts of this case. *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1264 & n. 3(5th Cir. 1981). We treat the latter part of this issue in Part V of this opinion.

Mississippi allows for service upon nonresidents pursuant to Miss.Code Ann. § 13–3–57 (Supp.1984), which provides in pertinent part:

> Any nonresident person . . . or . . . corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state, or who shall commit a tort in whole or in part in this state against a resident . . . shall by such act or acts be deemed to be doing business in Mississippi.

Mississippi allows for service on nonresidents who commit acts outside the state with foreseeable effects resulting within the forum. *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1007 (5th Cir.1982), *cited with approval in, First Mississippi National Bank v. S & K Enterprises of Jackson, Inc.*, 460 So.2d 839, 843 (Miss.1984). In *Mississippi Interstate*, the court found that a breach of Mississippi-centered contract occurring outside the state caused the nonpayment in Mississippi of amounts due there. This constituted sufficient contact with the forum to permit jurisdiction of the nonresidents. 681 F.2d at 1012. *Cf. First Mississippi*, 460 So.2d at 840–43. Similarly, the respondents in the present case intentionally committed actions in Texas which resulted in the nonpayment of amounts due into the court located in Mississippi.

This Mississippi statute does not require that the part of the tort which causes injury occur in Mississippi. Rather, only a part of the tort must occur in the state. *Breedlove v. Beech Aircraft Corp.*, 334 F.Supp. 1361, 1365 (D.Miss.1971). When MacKay took funds beyond the borders of the state in furtherance of his plan to secret the funds with the knowledge and consent of Currey and Johnson, this action satisfied the in-state requirement as far as respondents are concerned. We therefore hold that the Mississippi statutes would permit the assertion of jurisdiction over respondents based on the facts of this case.

We observe in this connection that the Waffenschmidts' suit against MacKay was grounded in the Securities Act of 1933 and the Securities Exchange Act of 1934, each of which provide for nationwide service of process. 15 U.S.C. §§ 77v(a), 78aa. In reaching our decision, however, we do not reach the issue

whether such nationwide jurisdictional provisions would of themselves establish jurisdiction over alleged non-party contemnors. Though the district court found it had jurisdiction under the securities acts to issue the TRO and preliminary injunction, it made no such findings as to jurisdiction over Currey and Johnson, and the litigants have not argued this question. Instead, we find that jurisdiction exists based on both the inherent power of a court to reach those who knowingly contemn its orders and the minimum contacts analysis set out below.

V

Currey and Johnson vigorously maintain that the assertion of jurisdiction over them violates minimum due process requirements as established by *International Shoe* and its progeny. A finding, however, that a nonparty has aided a party in knowingly violating an injunction satisfies due process. We reach this conclusion under a two part analysis: first, through an examination of the inherent powers of a court, and second, through traditional in personam jurisdiction analysis under *International Shoe*.

A

Haling a person into court only upon finding that the nonparty has aided in knowingly violating an injunction fulfillls traditional notions of fair play and substantial justice because it is foreseeable that the person would be required to respond in that forum. *See World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). By knowingly aiding MacKay, Currey and Johnson could reasonably anticipate that they would have to justify their actions to the court in Mississippi or suffer contempt remedies. *See id.; Kulko v. California Superior Court*, 436 U.S. 84, 97–98, 98 S.Ct. 1690, 1699–1700, 56 L.Ed.2d 132 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 216, 97 S.Ct. 2569, 2586, 53 L.Ed.2d 683 (1977).

Another factor for consideration is the relative burdens on the parties in litigating in a distant forum. The inconvenience to these respondents in having to defend themselves in a distant forum is balanced against the greater burden on the judicial system in having to conduct duplicitous proceedings in both Mississippi and Texas. Moreover, the Texas court cannot benefit from the Mississippi court's intimate familiarity with the case. Because the Mississippi court's injunction is not registerable in Texas, the Texas court would have to retry the evidence. *See Stiller*, 324 F.2d at 628. The plaintiffs also suffer a heavy burden in having to commence actions wherever the enjoined party and his agents choose to secrete the enjoined funds. Because respondents were required to defend themselves against the contempt charge only upon a finding that they knowingly aided in a violation of the court's orders, any inconvenience they must suffer resulting from litigating in a distant forum only results from their own actions. The balance of burden clearly preponderates in favor of jurisdiction in the court whose injunction is knowingly contempted.

Finally, a significant if not controlling factor in our decision is the special interest of the forum court in litigating the matter. The Supreme Court gave this factor great weight in *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 223 (1957). In *McGee*, the California court exercised jurisdiction of an Arizona corporation whose only contacts with the forum were the mailing of one insurance policy and several premium notices into the state. In asserting jurisdiction, the court relied on California's significant interest in providing relief to its residents when insurance companies refused to pay claims. The Court also noted the inconvenience to the plaintiffs in having to chase the defendant to a distant state. *Id.* at 223, 78 S.Ct. at 201.

We find in the present appeal that the special interest of the district court was at least as strong as that of *McGee*. The manifest need for a court to protect and enforce its own judgments is beyond doubt. The loss of such power would severely impair the integrity and authority of our judicial system. A

foreign court could not assert as strong an interest in ensuring that the issuing court's injunction was enforced.

Thus, upon consideration of the foreseeability of having to answer to the enjoining forum, the relative convenience of the parties, and the special interest of the forum court in litigating the matter, we conclude that traditional notions of due process are not offended by permitting jurisdiction of these respondents.

B

We turn now to an analysis of traditional in personam jurisdiction and conclude that despite the district court's conclusion that respondents possessed insufficient contacts, the court could assert traditional in personam jurisdiction over Currey and Johnson. We accept the court's conclusions that the sole "contact" these respondents had with Mississippi was their acceptance and dissipation of the enjoined funds from MacKay in Texas as his agents, with knowledge of the court's orders. We hold that, as a matter of law, this conduct is sufficient to satisfy the due process requirements as announced in *International Shoe* and its progeny.

Originally, due process required the "presence" of the person in the state before a court possessed such jurisdiction. *Pennoyer v. Neff*, 95 U.S. (5 OTTO) 714, 24 L.Ed. 565 (1877). *International Shoe* expanded this rule by permitting jurisdiction if the person had sufficient minimum contacts with the forum "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316, 66 S.Ct. at 158.

While state service of process statutes may not reach beyond this limit, *Prejean*, 652 F.2d at 1264, "due process does not compel the states to assert jurisdiction this far." *Id. See also Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 440, 72 S.Ct. 413, 415, 96 L.Ed. 485 (1952). We determined earlier, however, that the Mississippi long-arm statute permits jurisdiction over these respondents. We will additionally exam-

ine whether the assertion of personal jurisdiction over Currey and Johnson satisfies due process. Whether minimum contacts exist depends on the facts of each case. *Kulko*, 436 U.S. at 92, 98 S.Ct. at 1697.

Respondents allege that because they committed no act in Mississippi, they are not subject to the jurisdiction of courts located in that state, including United States district courts. As *Mississippi Interstate* illustrates, courts may assert jurisdiction of a person who acts outside the forum, but causes effects within it. As we stated in *Prejean* at 1268 (footnotes omitted):

> When a defendant purposefully avails himself of the benefits and protection of the forum's laws—by engaging in activity in the state or engaging in activity outside the state that has reasonably foreseeable consequences in the state—maintenance of the lawsuit does not offend traditional notions of fair play and substantial justice. Considerations such as the quality, nature, and extent of the activity in the forum, the foreseeability of the consequences within the forum from activities outside it, and the relationship between the cause of action and the contacts, relate to whether it can be said that the defendant's actions constitute "purposeful availment." In other words, a defendant's activities in relation to the state indicate he is on notice that he could be haled into its courts.

The actions of Currey and Johnson satisfy these requirements. They purposefully engaged in activity outside Mississippi that would have the foreseeable and intended result of dissipating assets subject to marshalling in that forum. The jurisdictional issue turns solely on the consequences which their acts had in Mississippi. The court is not trying to assert general in personam jurisdiction over these respondents for causes of action unrelated to their actions; it merely is holding them responsible for the intended consequences which their nonforum activities had on the subject matter of the court's

order. *See generally Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1170–71 (5th Cir. 1985). When Currey and Johnson purposefully accepted assets from MacKay which they knew were subject to an injunction by the district court in Mississippi, they cannot now complain that it was unforeseeable or unreasonable for them to be haled before the court. *Accord McGee, supra.*

Prejean listed three factors to determine whether purposeful availment exists when an out-of-state act causes effects within the forum:

> (1) the existence and degree of purposefulness with which the effect in that forum was created;
>
> (2) whether the defendant has other substantial contacts with the forum unrelated to the suit; and
>
> (3) the substantiality of the effect itself.

652 F.2d at 1269. *Prejean* also provided initial guidance in interpreting the interaction of these factors. We held that in all cases, the effect in the forum must have been purposeful. Satisfying this factor alone may justify the assertion of jurisdiction if the conduct is sufficiently intentional. If purposefulness is present but not very strong:

> the presence of one or both of the other two factors become crucial. If the creation of the effect is at least purposeful and the effect substantial, no other contacts are needed. On the other hand, if the effect of minimally purposeful creation is not substantial, other substantial contacts must exist. In other words, the stronger the form of the purposefulness, the less substantial must be either the effect or the other contacts.

Id. (citations omitted).

Currey and Johnson intended that their actions would have the effect of placing funds outside the reach of the Mississippi forum. "Purposeful creation is strongest when the defendant intended the impact to be felt in the forum." *Id.* at 1269 n. 18.

See also Black v. Acme Markets, 564 F.2d 681, 685 (5th Cir.1977). *See generally*, Restatement (2d) Conflict of Laws, § 8.23, at 289 (1982). Furthermore, intentionally violating a court's orders has a substantial effect on the administration of justice of general, as well as the proper completion of the Waffenschmidts' litigation in particular. Because their actions were intentional and the effects substantial, under *Prejean*, the lack of other contacts with Mississippi therefore does not defeat the exercise of jurisdiction.

VI

Currey and Johnson contend that even if the court had personal jurisdiction, its finding that they aided and abetted MacKay was clearly erroneous. Likewise, the Waffenschmidts contend that the finding that the Bank did not aid or abet MacKay was erroneous. We treat the evidence pertaining to each respondent individually, and conclude that in each instance, the record sufficiently supports the district court's findings. We therefore find no clear error.

A. Currey

Currey admitted that he knew of the TRO and the preliminary injunction when he prematurely cashed the $103,500 T-Note and interest coupon in October, 1983. He claims, however, that he received the funds from MacKay in early March, 1983 in good faith without notice of the court's orders. Accordingly, he asserts that he is a bona fide purchaser of the negotiable T-Note, and thus received good title to it. If true, then Currey asserts that he could negotiate the note even with knowledge of the court's orders, due to the policy favoring the ready negotiability of government notes. *See* U.C.C. § 3–305. We need not decide this issue, however, because the district court implicitly rejected his claim of good faith by holding that he accepted the note with knowledge of the court's orders.

The evidence amply supports this finding. According to Currey, he received the note from MacKay between March 1 and 10, which was before the TRO was issued by the district court

on March 16. The Waffenschmidts, however, proved that MacKay did not receive the T-Notes from the Bank until March 18.

Currey claims he received the note in connection with an alleged oral contract to sell MacKay a Holiday Inn hotel. Currey had previously sold another hotel and had retained an attorney and executed a written contract evidencing the sale. In contrast, for the MacKay transaction Currey admitted that he never documented the transaction or disclosed the sale to his wife or children, who were co-owners of the hotel. Neither did he discuss the sale with his bank, which was financing a substantial renovation of the inn.

The sale was never consummated, so Currey never transferred title to the hotel to MacKay. Despite having received the $103,500 T-Note and coupon from MacKay on a transaction that was never completed, and with full notice of the court's TRO, preliminary injunction, and contempt order against MacKay, Currey still prematurely cashed the T-Note in October of 1983 and applied the proceeds to the hotel renovations. However, he could not recall the name of the company to which he sold the T-Note and coupon. He again neglected to inform his banker that additional funds were being used for the hotel renovation.

Ample evidence therefore supports the finding that Currey did not receive the T-Note in good faith without notice of the court's orders. The district court clearly could find that the "sale" of the Holiday Inn was a sham. Further, Currey admitted he cashed the note with full knowledge of the court's orders. We find no clear error, then, in the court's finding that Currey aided or abetted MacKay in dissipating the funds.

Currey contends, however, that the court based its findings solely on his lack of credibility as a witness. In its opinion, the district court invoked the rule of *Dyer v. MacDougall*, 201 F.2d 265, 268–69 (2d. Cir. 1952), which states that the demeanor of a witness who has a motive to deny may justify a belief that not only is his testimony not true, but that the truth is the opposite of the witnesses' story.

As respondents correctly explain, the *Dyer* rule cannot serve as the sole evidence to carry the burden in a civil case. *See Nishikawa v. Dulles*, 356 U.S. 129, 137, 78 S.Ct. 612, 617, 2 L.Ed.2d 659 (1958). Plaintiffs must still prove that respondents aided or abetted MacKay through clear and convincing evidence. *See Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 646 F.2d 800, 809–10 (2d Cir.1981); *Stringfellow v. Haines*, 309 F.2d 910, 912 (2d Cir.1962).

Currey ignores, however, the abundance of other proof that the district court could have relied on to find that the alleged hotel sale was mere pretense. The district court did not expressly limit its findings to an invocation of the *Dyer* rule. This other proof, when viewed in conjunction with the *Dyer* rule, supports the finding that Currey aided and abetted MacKay. *Accord Lineker v. Dillon*, 275 F. at 463–64. We find no error here.

B. Johnson

Johnson also raises the *Dyer* argument, contending that the evidence was insufficient to support an aiding or abetting finding. We disagree.

Johnson was the sole owner of D & K which engaged in selling motorcycles, boats, motors, trailers, jet skis, and other sporting goods. D & K changed from a proprietorship to a corporation on January 24, 1983. That day, Johnson also signed as an incorporator of Tuff Tire Texas, Inc., which was owned by MacKay. Both corporate charters had been prepared by Johnson's legal counsel. Johnson never exercised duties for Tuff Tires, except to ship goods from a warehouse adjacent to D & K.

MacKay and Johnson had extensive business dealings, however, and Johnson purportedly received the $100,000 T-Note in connection with these activities. As early as March of 1982, MacKay purchased five jet skis from D & K for $10,500. Thereafter, MacKay became a substantial customer of D & K. According to Johnson, D & K would deliver to MacKay what-

ever he requested, and MacKay would usually settle his account by paying D & K a lump sum in a rounded amount.

Johnson claims MacKay paid D & K the $100,000 T-Note sometime in February or early March of 1983 as satisfaction for service and equipment which MacKay had purchased. Again, MacKay did not receive the T-Note until March 18, so the court could discredit Johnson's testimony. Further, Johnson could only document approximately $5,000 worth of outstanding debt for MacKay, which included several questionable repair bills.

Johnson's subsequent handling of the T-Note also adds to the incredulity of his story. He admitted that he knew the T-Note was negotiable by any bearer. Yet, he kept the note for three months in a filing cabinet in his store where he placed business records and invoices. He then cashed the T-Note on June 14, 1983, despite its later maturity date. Furthermore, although the note was paid to settle a D & K account, Johnson placed the proceeds from this note in a personal account under the name "James K. Johnson." Johnson, however was generally known by his middle name, "Kendall" or "Ken." Johnson admitted that before he cashed the T-Note, MacKay had told him that he was "under a lawsuit."

Finally, the rapid manner in which Johnson dissipated the proceeds from this note supports the incredible nature of his story. Between June 14 and 30, he spent all but $516.42 of the proceeds. Included in his purchases were two boats with motors and trailers worth $31,042.50. Johnson pledged these assets to the court in lieu of the supersedeas bond. Our discussion of this substitution is treated in Part VIII below. Johnson also made $71,300 in cash withdrawals, usually in $8,000 blocks, purportedly to purchase used equipment at motorcycle auctions and for other untraceable transactions. Johnson, however, was unable to adequately document these purchases, nor could he specifically itemize which products were purchased with the proceeds from the note.

Based on the foregoing evidence, the court could properly conclude that Johnson's story was inherently incredible and

that he accepted the T-Note from MacKay with full knowledge that the funds were subject to the court's injunction. The court could properly rely on the *Dyer* rule and the other proof to reach this conclusion.

Johnson contends that no evidence was offered to prove that he knew of the court's orders prior to cashing the T-Note. He thus asserts that the court improperly relied on its disbelief of Johnson as the sole evidence of such knowledge. The court, however, had ample circumstantial evidence to support its finding that Johnson had the requisite notice of the court's orders before cashing the note. Plaintiffs are not required to adduce direct evidence that Johnson had actual notice of the court's orders. *See United States v. Palacios*, 556 F.2d 1359, 1364 (5th Cir.1977); *United States v. Warner*, 441 F.2d 821, 825, 830 (5th Cir.), *cert. denied*, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971). Such proof is often unavailable. They may carry their burden of proving that Johnson had notice, as long as the proof is clear and convincing. Proof of Johnson's activities relating to his disposition of the funds, plus his demeanor at trial provided sufficient evidence of his knowledge and intent to meet plaintiffs' burden. The evidence supports the district court's finding that Johnson aided and abetted MacKay in dissipating the enjoined funds. We find no error here.

C. The Bank

The Waffenschmidts object to the release of the Bank when the court found it acted in good faith in its dealings with MacKay. They contend that good faith is irrelevant to a finding of civil contempt, because civil contempt is designed to compensate a plaintiff, not to punish the defendant. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 499–500, 93 L.Ed. 599 (1948); *Union Tool Co. v. Wilson*, 259 U.S. 107, 111-12, 42 S.Ct. 427, 428–29, 66 L.Ed. 848 (1922); *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 128 n. 2 (2d Cir.1979); *Doe v. General Hospital of District of Columbia*, 434 F.2d 427, 431 (D.C.Cir.1970). Therefore, they contend that the Bank should have been held in civil contempt, despite its apparent good faith.

The Waffenschmidts misinterpret the court's holding. Although good faith is irrelevant as a defense to a civil contempt order, good faith is relevant to whether the Bank aided or abetted MacKay in dissipating the funds with knowledge that it was violating the court's orders. When the court found that the Bank failed to act as MacKay's agent, it could not exercise jurisdiction over the Bank. The court, therefore, never reached the issue of whether the Bank was in contempt of its orders, or if any valid defenses were present to militate against a contempt order.

A review of the evidence demonstrates that the district court's finding that the Bank did not aid or abet MacKay was not clearly erroneous. The Bank admittedly received a copy of the TRO and its extension through May 27, 1983. Its president, Greer, referred the TRO to the Bank's counsel, who cautioned that the Bank should not act out of the normal course of its regular business dealings with MacKay. The TRO specifically allowed persons to continue such regular dealings with MacKay. The Bank also contacted MacKay for an explanation, who assured the Bank that the TRO involved no funds concerning his dealings with the Bank. While the Waffenschmidts are highly critical of this negligent action, it does not affect the conclusion that the Bank did actively aid or abet MacKay with knowledge that it was violating the court's orders.

The Bank, relying on MacKay's assurances, loaned him funds, but required him to pledge a note or coupon as collateral for each transaction. The Bank thus acquired a "cash equivalent" as security, in light of MacKay's questionable dealings in Mississippi. MacKay told the Bank on June 2, 1983 that he would be unable to repay the loans and instructed the Bank to apply the proceeds of the T-Notes to his debt. When the Bank acted upon these instructions, however, it did not violate any known court order, because the TRO that it had received expired by its own terms on May 25, 1983. The Bank did not receive a copy of the preliminary injunction until July 25, 1983. Thus, at the time the Bank sold the T-Notes and coupons, it was aware of no existing order of the court that it would be violat-

ing. These findings by the district court are not clearly erroneous; therefore, it correctly held that it lacked jurisdiction of the Bank to hold it in contempt.

VII

All parties appeal the district court's adverse rulings concerning attorney's fees. The award or denial of attorney's fees by a district court will not be overturned absent an abuse of discretion. *In re Hunt*, 754 F.2d 1290, 1294 (5th cir. 1985). Based on the evidence discussed in the preceeding sections, the court had ample evidence to conclude that Currey and Johnson aided and abetted MacKay in vioalting the court's injunction. This vexatious conduct justified the award of attorney's fees against them. *See F.D. Rich Co., Inc. v. United States ex rel Industrial Lumber Co., Inc.*, 417 U.S. 116, 129, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974). The court was also well within its discretion in concluding that the Waffenschmidts had a sufficiently viable claim to require the Bank to bear its own attorney's fees. The Waffenschmidts could not collect attorney's fees from the Bank when the Bank prevailed on the merits both in the district court and on appeal. The same hold true for Currey and Johnson in their attempt to collect fees from the Waffenschmidts. The parties have failed to demonstrate any abuse of discretion by the trial court. We affirm the court's rulings on this issue.

VIII

Finally, the Waffenschmidts object to the substitution of the $31,042.50 worth of boats, motors, and trailers in place of a supersedeas bond in the amount of $106,840.09. They contend that this action has unjustly jeopardized their right to collect on the judgment.

"[A] supersedeas bond is a privilege extended to the judgment debtor as a price of interdicting the validity of an order to pay money." *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th cir.1979). We stated in *Poplar Grove*, however, that if the judgment debtor

demonstrates that his "financial condition is such that the posting of a full bond would impose an undue financial burden, the court . . . if free to exercise a discretion to fashion some other arrangement for substitute security . . . which would furnish equal protection to the judgment creditor." *Id.* at 1191.

The district court reviewed Johnson's assets, and Johnson offered to pledge any of them as security pending this appeal. The court concluded that the pledge of the $31,042.50 worth of assets would serve as sufficient collateral since the values in the remaining assets were already encumbered. Waffenschmidt does not contend that the court did not require the pledge of all property values then possessed by Johnson. Rather than deprive Johnson of his right to stay of execution on the judgment pending appeal, the district court permitted the substitution.

The Waffenschmidts' appeal on this issue stands in a unique and somewhat frustrating position. They did not seek preliminary relief from this order pending appeal, leaving us instead to decide this matter in conjunction with the remainder of the case. At this late stage in the appeal, we cannot afford the Waffenschmidts the relief they seek without severing this aspect of the case from the other issues. The Waffenschmidts have not asked us to do so, and we are not persuaded that a severance on this issue would serve the interests of justice. Severing this issue is as likely to impede as to facilitate a prompt resolution of this appeal and the payment into the court of the proceeds from the MacKay transaction.

Any decision we would make on the supersedeas issue would have no effect until the mandate issued from this court. Once our mandate issues affirming the judgment, the Waffenschmidts no longer need a supersedeas bond—they may execute on the judgment. If Johnson has sufficient assets to satisfy the judgment, the Waffenschmidts may reach them. If, however, Johnson lacks sufficient assets, reversing the district court in this issue as a part of this judgment would be unavailing.

Should further proceedings in this or another court delay the Waffenschmidts' ability to execute on their judgment and the

Waffenschmidts can show any change of circumstances since the district court's initial ruling, such as an improved financial condition of Johnson, they may petition the district court to reconsider the substitution. At this juncture of this appeal, we cannot provide greater relief.

We affirm the judgment of the district court in all respects. We do not reach the issue of the substitution of collateral.

AFFIRMED.

APPENDIX A-1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4012

FRIEDRICK WELHELM WAFFENSCHMIDT, *et al.*,
Plaintiffs-Appellees-Appellants-Cross-Appellees
VERSUS
JACK W. MACKAY, JR., *et al.*,
Defendants,
PALMORE CURREY, II, *et al.*,
Appellants-Cross- Appellees,
FIRST NATIONAL BANK OF MOUNT VERNON, TEXAS,
Appellee-Cross-Appellant Cross-Appellee.

Appeals from the United States District Court for the Northern District of Mississippi

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion June 21, 1985, 5 Cir., 198—, ____ F.2d ____)

(August 5, 1985)

Before CLARK, Chief Judge, GARWOOD and HILL, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Charles Clark /s/
CHIEF JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CIVIL ACTION
No. EC 83-81-WK-P

FRIEDRICH WILHELM WAFFENSCHMIDT, *et al.*,
Plaintiffs,

v.

JACK W. MACKAY, JR., *et al.*,
Defendants.

MEMORANDUM OF DECISION

On Friday, December 2, 1983, the Court conducted an evidentiary hearing on plaintiffs' petition for an order directing the respondents, Palmore Currey, II (Currey), Kendall Johnson, D & K Motor Sports, Inc. (collectively Johnson), and the First National Bank of Mount Vernon, Texas (Bank), to show cause why they should not be held in civil contempt of this court's temporary restraining order issued March 16, 1983, enjoining MacKay and others from transferring, concealing, disposing of or encumbering any proceeds received from the plaintiff Waffenschmidts. The TRO was extended to May 21, 1983. A preliminary injunction (PI) incorporating substantially the provisions of the TRO issued on May 27, 1983. All parties were allowed full opportunity to present oral and documentary evidence in support of their respective positions. Having heard the evidence, the Court now makes findings of facts and conclusions of law as follows.

FINDINGS OF FACT

Currey and Johnson are residents of Mount Pleasant, Texas. D & K Motor Sports, Inc., is a Texas corporation owned by Johnson. The Bank is a national banking association located in Mount Vernon, Texas. None of the respondents has transacted business or owned assets within the State of Mississippi which would subject any of them to the in personam jurisdiction of this Court.

As a portion of the proceeds of the Waffenschmidt sale, MacKay had in his possession in March 1983 three $100,000 United States Treasury Notes that are material to this case. One note with $3,500 coupon attached was received by Curry, one note was received by Johnson and one note with over $30,000 coupons attached was received by the Bank.

A. Currey

1. On July 12, 1983, Currey acknowledged having possession of the treasury note with coupon attached that MacKay had given to him on a previous occasion. (Currey Dept. 10–11, 14–15, and testimony). On July 12 and 14, he was advised both orally and in writing of the Court's prior orders, specifically the TRO and PI (Currey's testimony; Exhibit 655). It was explained to him that the orders directed MacKay, his agents and any person acting in concert or in participation with him to pay the proceeds into the registry of the Court and not otherwise dispose of or encumber them. Notwithstanding this explanation, Currey declined to comply.

2. On August 12, 1983, MacKay was held in civil contempt and directed that he be incarcerated unless he obtained from Currey the $100,000 treasury note and coupon previously given to him. Upon MacKay's failure to do so, Currey was advised no later than early September 1983 of the contempt order and he declined to honor the same. Currey asserts that sometime in October 1983 he disposed of the treasury note and coupon to a third party. Currey asserts that thereafter he spent the proceeds on renovating the Holiday Inn at Mount Pleasant, Texas,

even though he had previously obtained a bank loan to finance the renovation. (Currey testimony; Currey Dep. 24).

3. The treasury note and coupon held by Currey were not due until November 15, 1983 (Exhibit 360), and he provided no satisfactory explanation as to his negotiation of the treasury note prior to maturity.

4. Currey's claim that he is entitled to the $103,500 as forfeit money for the failure of MacKay to perform by June 1, 1983, an oral agreement to purchase the Mount Pleasant Holiday Inn for $2,700,000 is incredible, and not worthy of belief.

5. Currey's claim that he had an alleged agreement with MacKay in early March 1983 for MacKay to purchase the Holiday Inn from Western Interests Corporation, a Texas corporation which owned the Holiday Inn, did not justify Currey's retaining the treasury and coupon.

6. Currey's claim of an oral agreement is unbelievable because, among other reasons:

(a) There was no writing contemporaneous or otherwise that confirmed the existence of the alleged agreement;

(b) Currey failed to tell anyone of the alleged agreement, including his wife and children who were also shareholders in the corporation that owned the Holiday Inn;

(c) Currey failed to disclose his alleged possession of the $100,000 treasury note and coupon to his own banker, who was financing the substantial renovation of the hotel;

(d) The structure of the deal and the assumption by MacKay of notes held by Currey's relatives and others was never finalized, and no real understanding reached between MacKay and Western Interests Corporation; and

(e) The treasury note had attached a November 15, 1983, coupon, but not a May 15, 1983, which MacKay pledged to First National Bank of Mount Vernon on April 15, 1983, indicating that Currey received the treasury note and coupon after that

date and note between March 1 and March 10, 1983, as Currey testified.

(f) Currey, an experienced businessman, retained the treasury note at his office without issuing a receipt to MacKay, and produced no records of any kind concerning the transaction or manner in which it was allegedly negotiated to a third party.

7. Currey's testimony, which is unsupported by any corroboration other than MacKay, his failure to produce any records to support his claim of entitlement and his demeanor on the witness stand constrain the Court to not only find his testimony incredible but affords the Court no choice, in the light of undisputed facts, but to believe the exact opposite of what he asserts the truth to be.

8. The alleged verbal transaction between MacKay and Currey is fictitious and did not occur as narrated by Currey. It necessarily follows that Currey received the $100,000 treasury note and coupon from MacKay for the purpose of aiding and abetting a plan or scheme to violate the Court's injunctive orders issued before the delivery of the treasury note and coupon. In handling such security, Currey has acted as MacKay's agent, servant and/or employee and has acted in active concert and participation with him regarding such funds after receiving actual notice, both by him and his attorney, by service and otherwise, to violate this Court's orders.

B. Johnson

1. Johnson was the owner and operator in January 1983 of a business incorporated under the name of D & K Motor Sports, Inc., of Mount Pleasant, Texas, which was engaged in selling motorcycles, boats, motors, jet skis and other sports goods. For at least nine months prior to January 1983, Johnson and his firm had substantial business dealings with MacKay in selling MacKay jet skis, motors, boats and doing various repair jobs. MacKay's trade amounted to nearly one-half of Johnson's gross sales. Johnson saw MacKay almost every day during this

period, a friendship developed between the two (Johnson Dep. 85), and Johnson served as incorporator, director and officer of the Tuff-Tire of Texas, Inc., an entity solely owned and controlled by MacKay. At MacKay's direction, Johnson would sign certificates of title to items of personal property (Johnson Dept. 61–63), and testified that because of the fine customer relations with MacKay, he would undertake to satisfy him in most anything MacKay might want. (Johnson testimony). On January 14, 1983, Johnson received a $30,000 wire transfer and on March 3 an additional $10,000 payment to settle past indebtedness. (Johnson testimony).

2. Johnson received "in the early spring" of 1983 a $100,000 treasury note which he says that MacKay voluntarily produced without demand, and that Johnson took possession of the note and placed it in a filing cabinet at his store until early June. Johnson says he told only his wife about the note and that he did not take it to the bank for safekeeping.

3. At his deposition in July 1983, Johnson produced all of the documents reflecting purchases of goods and services by MacKay, totalling $101,699, and credits to MacKay in the form of checks, wire transfers and counter tickets reflecting payments totaling $90,031.72. In addition, MacKay was given a $7,500 credit for the transfer of a Centurion boat on April 25, 1983. (Johnson testimony; Exhibit 670). On the witness stand, Johnson stated that other transactions he had with MacKay were in a separate box which he could not locate. On the basis of the record shown to this Court, MacKay could have owed Johnson no more than $5,000 at the time of MacKay's gratuitous delivery of the $100,000 treasury note. Absent other documentation, Johnson's testimony that there was any sizable indebtedness owed to him by MacKay, after the admitted credits, must be rejected as unworthy of belief, and the Court finds that MacKay delivered the note to Johnson for purposes other than to pay indebtedness.

4. Although Johnson testified the treasury note was received in payment of D & K obligations, the note was cashed in June

1983, placed in his personal account and within a month Johnson says that he had spent all but $500, receiving cash in large denominations from his bank for the ostensible purpose of attending public auctions to buy used motorcycles and parts. The Court concludes that Johnson's testimony, uncorroborated other than by MacKay, as to the time when he received the treasury note and the purpose for which it was given is inherently incredible and that Johnson's actual purpose in receiving the note was to do so as MacKay's agent and to serve MacKay's purposes.

5. Johnson admitted that he and his attorney received correspondence from plaintiffs' counsel about the PI and contempt order imposed upon MacKay and was aware of the fact that before he cashed the treasury note MacKay was "under a lawsuit." It is reasonable to believe that Johnson had knowledge at the time he received the treasury note that MacKay was under a court order not to dispose of any proceeds derived from the Waffenschmidt sale. The Court expressly finds no value was given or extended by Johnson entitling him to hold the treasury note and dispose of it without the consent and permission of MacKay. The Court therefore finds as a fact that Johnson acted as agent, servant and employee in active concert and participation with MacKay to violate this court's orders after having actual notice from MacKay.

C. Bank

1. In June 1982, MacKay began a banking relationship with the Bank by depositing $1,000,000 into an account opened in his name. Within twenty-four hours, MacKay used this money to purchase certificates of deposit from various banks; $200,000 in certificates of deposit were purchased from the Bank. Over the next nine months, MacKay carried on an active and substantial banking business with the Bank, routinely making wire transfers in substantial amounts and borrowing substantial sums at regular intervals. From July 26, 1982, to March 17, 1983, the Bank loaned MacKay a total of $370,000 in six separate transactions. Each loan was secured by federally insured

certificates of deposit or treasury notes. No loans made to MacKay by the Bank were unsecured; none was secured by other than liquid, cash-equivalent collateral.

2. The Bank was unaware of the source of the funds with which MacKay opened his account. When Bank President Greer first met MacKay in May 1982, MacKay told Greer that he had substantial business dealings in Iran and Missouri, and that he had recently sold a farm in Mississippi. MacKay did not advise Greer of the extent of any proceeds that MacKay realized from the Mississippi farm sale, and the Court finds that the Bank had no knowledge that the funds deposited into the Bank had any connection with the Mississippi transaction. Nor did the Bank have any knowledge concerning the nature of that transaction, or involvement of the plaintiffs in it. What Greer did know was that MacKay appeared to be a man of substantial means who, on at least one occasion, advised Greer that he had a net worth of $19,000,000. Because all transactions MacKay had with the Bank were fully secured by cash-equivalent collateral, Greer had no occasion to obtain any financial statement from MacKay and no financial statement was ever given to the Bank by MacKay.

3. Greer established a relationship with MacKay which was consistent with the relationship he had with other substantial depositors of the Bank. Although Greer saw MacKay socially on a few occasions, there is no evidence that MacKay and Greer even became close personal friends or that MacKay ever took Greer into his confidence concerning the subject matter of the Waffenschmidt transaction.

4. On March 21, 1983, a copy of the TRO was received by the Bank in the mail in Mount Vernon, Texas. Greer reviewed it and forwarded it to his attorney, B. F. Hicks, for advice. On March 25, 1983, the Bank received a copy of the order extending the TRO, which Greer reviewed and forwarded to Hicks. Greer questioned MacKay, who assured him that the Waffenschmidt transaction was unrelated to any of MacKay's transactions with the Bank.

5. Attorney Hicks advised Greer to be cautious with MacKay and not to have any dealings out of the ordinary course of the Bank's business operations with him. Neither Hicks nor Greer interpreted the TRO as requiring the Bank to cease doing all business with MacKay, but only to exercise reasonable banking judgment.

6. On April 15, 1983, consistent with its earlier established practice with MacKay, the Bank loaned MacKay $15,000, taking custody of a treasury note coupon which he tendered to the Bank. On April 28, 1983, the Bank loaned MacKay another $15,000, again taking custody of a treasury note coupon. Both loans were for personal use. On May 4, 1983, the Bank loaned MacKay $100,000, which was secured by a treasury note simultaneously tendered to the Bank by MacKay, ostensibly made for business purposes. The Bank had no knowledge that MacKay was in fact diverting or squandering loan proceeds in disregard of the Court's order.

7. At no time was the Bank ever specifically advised that the treasury notes and coupons MacKay tendered as security for the April 15, April 28, and May 4 loans had any connection with the assets described in the TRO.

8. On May 25, 1983, the extension of the TRO entered on March 22 expired, and the Bank received no notice that any injunction had been entered in this action affecting MacKay or the Bank. The Bank did not receive this Court's May 27, 1983, injunction until July 25, 1983. From May 25, 1983, until at least June 29, 1983, when Greer's deposition was taken, the Bank was without actual notice of the entry of any preliminary injunction, following the expiration of the TRO.

9. On June 2, 1983, at a time when the Bank had no notice of any outstanding injunctive order, the Bank sold the treasury note and attached coupons tendered on April 15, April 28, and May 4, 1984, and applied the proceeds to MacKay's then outstanding indebtedness. After this sale and application of collateral, MacKay owed the Bank $20,634.58, which was an unsecured debt. Also, on June 2, 1983, Greer asked MacKay for

additional collateral, and MacKay agreed to permit the Bank to place a lien on a 1984 Corvette which MacKay had purchased with the proceeds of the May 4, 1983, loan. With respect to the 1984 Corvette, the Bank had no notice of the existence of a preliminary injunction; nor did MacKay express any reluctance to give the Bank this lien. The Court finds that the Bank obtained this lien in good faith and without notice of any contrary order of this Court.

10. In each of the relevant loan transactions, the Bank was acting not to aid and abet MacKay in disposing of his assets in defiance of this Court's TRO, but as a lending institution dealing at arm's length with a substantial customer in the ordinary and usual course of its business. At no time did the Bank have specific notice or knowledge that any of the security it acquired was subject to the TRO. Also, the loan transactions which plaintiffs challenge were ordinary business operations when viewed in the context of the relationship between MacKay and the Bank. Given MacKay's history with the Bank, there was nothing in the loans of April 15, April 28, and May 4 to have alerted the Bank that MacKay was acting otherwise than in the ordinary course of his affairs. The Bank made such loans in good faith, taking only the usual collateral that it had taken for previous loan transactions made before the entry of the TRO. In this regard, the TRO specifically excepted not only transactions in the ordinary conduct of business operations, but also living expenses, payment of debts, and other obligations in the normal course of affairs. There is no basis to conclude that the Bank in fact consciously schemed or plotted with MacKay to aid and abet him in violating the Court's order, or to assist him in disposing of forbidden assets. On the contrary, the banking transactions were made in good faith. Although the Bank, in retrospect, might have exercised greater care and caution, its actions, when viewed in the light of the whole evidence, are insufficient to charge the Bank as an aider and abetter, or an active participant with MacKay to disregard the Court's order.

CONCLUSIONS OF LAW

1. We find applicable to the testimony of Currey and Johnson the following principle:

> [T]he carriage, behavior, bearing, manner and appearance of a witness—in short, his 'demeanor'—is part of the evidence . . . [S]uch evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to given assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

Dyer v. *MacDougall*, 201 F.2d 265, 268–69 (2d Cir. 1952) (per Judge Learned Hand).

2. It is well established that the mandate of an injunction entered by a federal district court runs throughout the United States. *Stiller* v. *Hardman*, 324 F.2d 626, 628 (2d Cir. 1963).

3. A temporary restraining order, preliminary injunction or order of contempt can only be enforced in the court which issues the order. *Stiller* v. *Hardman*, 324 F2d at 628; *Bedgood* v. *Cleland*, 554 F. Supp. 513, 517 (D. Minn. 1982).

4. This Court's orders bind the parties before it and those who are the parties' agents, servants or employees, and those persons in active concert or participation with the parties. Fed. R. Civ. P. (65(d).

5. For a nonparty to be bound by an order of this court, such nonparty must have received actual notice of the order and be an agent, servant, employee of, or in active concert or participation with, the party who violates the order. Only when such a connection is shown by clear and convincing evidence may a nonparty over whom there is no traditional in personam jurisdiction be held in contempt. Wright & Miller, *Federal Practice and Procedure: Civil* § 2956, at 556-57, 562–63 (1973). See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 112, 23 L. Ed. 2d 129, 141 (1969) (injunction does not reach nonparty absent determination that nonparty was in active concert or participation with party); *Alemite Mgf. Corp.* v. *Staff*, 42 F.2d 832, 832–33 (2d Cir. 1930) (nonparty aider and abetter subject to contempt).

A. Currey

6. Currey received a copy of the TRO, the PI and the contempt order when he had possession of the treasury note and coupon, to which he had no valid and enforceable claim. He was informed that they were the proceeds against which the orders were specifically directed.

7. Currey acted as MacKay's agent in receiving and disposing of the treasury note and coupon in violation of the TRO, the PI and contempt order.

8. Accordingly, the Court has jurisdiction over Currey to adjudicate him in contempt of the TRO, PI and contempt order, and hereby finds him in contempt of those orders.

B. Johnson

9. Johnson was MacKay's agent for purposes of receiving and disposing of a $100,000 treasury note in violation of the TRO and PI and as such had notice of the terms of those orders at the time he received the treasury note from MacKay. Johnson aided and abetted him in receiving and disposing of the note, contrary to court order.

10. Accordingly, this Court has jurisdiction over Johnson to adjudicate him in contempt of its prior orders, and hereby finds him in contempt of those orders.

C. Bank

11. The Court concludes that the Bank is not guilty of civil contempts since it was not an agent, servant or employee of MacKay, and its conduct of banking transactions with MacKay did not constitute active concert or participation with him to violate this Court's orders. Absent a conscious scheme to violate a court order, mere negligence, without more, cannot subject a nonparty, otherwise acting in good faith, to a finding of contumacious behavior.

REMEDIES

Parties who are in civil contempt are obligated to reimburse the injured party for losses and expenses incurred because of

noncompliance with valid court orders. *Norman Bridge Drug Co.* v. *Banner*, 529 F.2d 822, 827 (5thCir. 1976). In this instance, plaintiffs have lost $103,500 because of the contempt of Palmore Currey, II, and $100,000 because of the contempt of Kendall Johnson acting individually and on behalf of D & K Motor Sports, Inc. Said parties are therefore required to pay into the registry of this court as a compensatory fine the aforesaid amounts. Because of their contumacious conduct, said parties are also liable to plaintiffs' counsel for reasonable attorneys fees and expenses incident to the contempt hearing.

The petition to cite the First National Bank of Mount Vernon, Texas, is dismissed. The Bank's application for attorneys fees, however, is denied in view of the serious contest made by the plaintiffs as to the issue of its noncompliance with the TRO and the PI.

Orders consistent with this Memorandum of Decision are herewith issued.

This 9th day of December, 1983.

William C. Keady /s/

United States District Judge

APPENDIX C
CONSTITUTION OF THE UNITED STATES

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall otherwise be reexamined in any Court of the United States, than according to the rules of the common law.

No. 85-601

Supreme Court, U.S.
FILED
NOV 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PALMORE CURREY, II,

Petitioner,

vs.

FRIEDRICH WILHELM WAFFENSCHMIDT, ANNA WAFFENSCHMIDT and SUNBURST FARMS, INC.,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Was the Court of Appeals correct in affirming the district court's assertion of jurisdiction to hold a nonresident third party in contempt for knowingly aiding a defendant's contemptuous violation of the district court's injunctive orders?

PARTIES INVOLVED

The plaintiffs in this action are Friedrich Wilhelm Waffenschmidt ("Fritz"), Anna Waffenschmidt ("Anna") and Sunburst Farms, Inc. ("SFI").

One of the original defendants in this action is Jack W. MacKay, Jr. ("Mackay"). The United States District Court for the Northern District of Mississippi, Eastern Division, by Judge William C. Keady, on August 12, 1983 held MacKay in civil contempt and jailed him to compel compliance with its orders. The district court relased MacKay on November 10, 1983 when it concluded that incarceration had become punitive, though the contempt had not been purged.

Thereafter, on December 9, 1983 the district court held third party respondents Palmore Currey, II ("Currey"), Kendall Johnson ("Johnson") and his company D&K Motor Sports, Inc. ("D&K") in civil contempt for aiding MacKay's contempt. The district court declined to hold third party respondent The First National Bank of Mount Vernon, Texas (the "Bank") in civil contempt, although it found that the Bank had aided Mackay negligently, but in good faith.

Currey, Johnson and D&K appealed to the Fifth Circuit Court of Appeals, and the plaintiffs cross-appealed against the Bank. The Fifth Circuit affirmed the district court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES INVOLVED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
The Temporary Restraining Order	2
The Preliminary Injunction	3
The Order Of Contempt Against MacKay	3
The Judgment Against Currey, Johnson And D&K	4
Currey's T-Note Was Proceeds From The Fraud Upon The Waffenschmidts	4
Currey's Transparently False Story	5
The Circumstances Demonstrating Currey's Story Is Untrue	6
The Liquidation Of The T-Note And Coupon In Violation Of The District Court's Orders	7
SUMMARY OF THE ARGUMENT	9
ARGUMENT	11

Page

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE FEDERAL DISTRICT COURT HAD INHERENT POWER TO HOLD CURREY IN CONTEMPT AS A THIRD PARTY KNOWINGLY AIDING A PARTY IN VIOLATING INJUNCTIVE ORDERS 11

II. THE FIFTH CIRCUIT'S ALTERNATIVE HOLDING THAT THERE WAS JURISDICTION OVER CURREY UNDER THE MISSISSIPPI LONG-ARM STATUTE IS ALSO CORRECT 15

III. THERE WAS AMPLE EVIDENCE TO SUPPORT THE DISTRICT COURT'S JUDGMENT AGAINST CURREY 16

CONCLUSION 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

Cases	Pages
Alemite Mfg. Corporation v. Staff, 42 F.2d 832 (2d. Cir. 1930)	11, 12
Bedgood v. Cleland, 554 F. Supp. 513 (D. Minn. 1982)	12
In re Debs, 158 U.S. 564, 15 S. Ct. 900 (1895)	9, 12
Dyer v. MacDougall, 201 F.2d 265 (2nd Cir. 1952)	10
First Flight Company v. National Carloading Corporation, 209 F. Supp. 730 (E.D. Tenn. 1962)	14
First Mississippi National Bank v. S&K Enterprises of Jackson, Inc., 460 So. 2d 839 (Miss. 1984)	15
Gompers v. Buck's Stove & Range Company, 221 U.S. 418, 31 S. Ct. 492 (1911)	9
International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154 (1945)	13
Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 52 S. Ct. 238 (1932)	9, 11
Ex parte Lennon, 166 U.S. 548, 17 S. Ct. 658 (1897)	11
Mississippi Interstate Express, Inc. v. Transpo, Inc., 681 F.2d 1003 (5th Cir. 1982)	10, 15
Mississippi Pub. Corporation v. Murphree, 326 U.S. 438, 66 S. Ct. 242 (1946)	13

	Pages
Nishikawa v. Dulles, 356 U.S. 129, 78 S. Ct. 612 (1958)	10. 16
Parker v. United States, 153 F.2d 66 (1st Cir. 1946)	16
Regal Knitwear Co. v. National Labor Relations Board, 324 U.S. 9, 65 S. Ct. 478 (1945)	9, 11
Reich v. United States, 239 F.2d 134 (1st Cir 1956), *cert. denied*, 352 U.S. 1004, 77 S. Ct. 563 (1957)	11
Robertson v. Railroad Labor Board, 268 U.S. 619, 45 S. Ct. 621 (1925)	13
Robinson v. Penn Central Company, 484 F.2d 553 (3d Cir. 1973)	14
Shillitani v. United States, 384 U.S. 364, 86 S. Ct. 1531 (1966)	9
Stiller v. Hardman, 324 F.2d 626 (2d Cir. 1963)	12
Toland v. Sprague, 37 U.S. (12 Pet.) 300 (1838)	13
United States v. Hall, 472 F.2d 261 (5th Cir. 1972)	11
United States v. Union Pacific R. Co., 98 U.S. 569 (1878)	13
Zenith Radio Corporation v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562 (1969)	12
CONSTITUTION	
U.S. Constitution, Fifth Amendment	1, 13, 15
U.S. Constitution, Fourteenth Amendment	13, 14

	Pages
STATUTES	
Securities Act of 1933 §12, 15 U.S.C. §77*l*	2
Securities Act of 1933 §22(a), 15 U.S.C. §77v(a)	14
Securities Exchange Act of 1934 §10(b), 15 U.S.C. §78j(b)	2
Securities Exchange Act of 1934 §27, 15 U.S.C. §78aa	14
Racketeer Influenced and Corrupt Organizations Act of 1970 §901(a), 18 U.S.C. §1961, *et seq.*	2
All Writs Act, 28 U.S.C. §1651	15
United States Judicial Code §1963, 28 U.S.C. §1963	12
Mississippi Code Annotated §75-71-401	2
Mississippi Code Annotated §75-71-501	2
Mississippi Code Annotated §75-71-717	2
Mississippi Code Annotated §75-71-719	2
RULES AND REGULATIONS	
17 C.F.R. §240.10b-5	2
Federal Rules of Civil Procedure 4(f)	14, 16
Federal Rules of Civil Procedure 65(d)	1, 11, 12, 14
TREATISES	
11 Wright & Miller, Federal Practice and Procedure, §2965 (1973)	12

PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived* of life, *liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

(Emphasis added.)

Rule 65(d) of the Federal Rules of Civil Procedure states:

> *Every order granting an injunction and every restraining order* shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and *is binding only upon the parties* to the action, *their* officers, *agents*, servants, employees, and attorneys, *and upon those persons in active concert or participation with them who receive actual notice* of the order *by personal service or otherwise.*

(Emphasis added.)

STATEMENT OF THE CASE

This action[1] was brought on March 9, 1983 in the United States District Court for the Northern District of Mississippi, Eastern Division, to redress a massive and elaborate fraud perpetrated upon Fritz and his wife Anna (together the "Waffenschmidts") by, among others, MacKay and the Waffenschmidts' investment advisors and attorneys, in connection with the Waffenschmidts' purchase of the stock of SFI, the principal asset of which was a farm near Columbus, Mississippi. The fraud centered around misrepresentations that the farm had made increasing annual net profits from about $600,000 in 1976 to about $1,200,000 in 1981, when in actual fact the farm had lost money (twice the losses exceeded $500,000) in each of those years.

On plaintiffs' motion for a preliminary injunction, the district court held that plaintiffs had demonstrated "a substantial, if not overwhelming, likelihood of success on the merits." (R. 96.) While Currey's, Johnson's and D&K's appeal to the Fifth Circuit was pending, on October 17, 1984 the Waffenschmidts and SFI obtained a jury verdict against MacKay for $8,084,681 based on federal and state securities violations, RICO, common law fraud, breach of contract and conversion. The verdict was reduced to a judgment of $5,084,681 to account for prior settlements with other named defendants.

The Temporary Restraining Order

Shortly after the commencement of the action, on March 16, 1983 the plaintiffs obtained a temporary restraining order (the

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[1] Among other things, the complaint asserted violations of section 12 of the Securities Act of 1933 (15 U.S.C. §77*l*), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)), and Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5), corresponding sections of the Mississippi Blue Sky statute (sections 75-71-401, 75-71-501, 75-71-717 and 75-71-719 of the Mississippi Code Annotated), section 901(a) of the Racketeer Influenced and Corrupt Organizations Act of 1970 (18 U.S.C. §1961, *et seq.*) ("RICO"), common law fraud, breach of contract and conversion. (R. 1-85.)

"TRO") against MacKay and others enjoining them, "and all persons acting in concert with them," from, among other things, transferring, concealing or disposing of any funds, or proceeds therefrom, received from the Waffenschmidts. (R. 87.) The TRO was extended through May 24, 1983 by agreement among the parties and order of the district court (R. 90-91) and through the evidentiary hearing on plaintiffs' motion for a preliminary injunction by order of the district court (R. 92-93).

The Preliminary Injunction

Following a four-day evidentiary hearing, the district court granted an Order of Preliminary Injunction dated May 27, 1983 (the "PI") against MacKay and another, "their agents, designees, representatives or other persons acting in concert with them," among other things, prohibiting any acts forbidden by the TRO or the transfer of real or personal property acquired since March 19, 1982, and directing them to "pay over and deliver" all such assets other than real property to the clerk of the district court "to assure that if the plaintiff Waffenschmidts prevail ... assets ... will be available to satisfy such judgment." (R. 94-103, 113-114.)

The Order Of Contempt Against MacKay

On June 23, 1983 the plaintiffs moved for an order requiring MacKay to show cause why he should not be held in contempt for violating the TRO and the PI. (R. 104, 116.) Following evidentiary hearings on July 1 and 15, 1983 the district court entered an Order of Contempt dated August 12, 1983 (R. 104-108) finding:

> MacKay made prohibited transfers and caused and permitted encumbrances to be placed on the proceeds of the fraud practiced upon plaintiffs [1] [A] on March 17, 1983 ($100,000), [B] April 15, 1983 ($15,000), [C] April 28, 1983 ($15,000), [D] May 4, 1983 ($100,000) at the ... Bank ..., [2] $100,000 to Palmore Currey, and [3] $100,000 to Kendall Johnson and/or D&K Motor Sports, Inc. ...

(R. 105.)

The district court ordered MacKay incarcerated until he paid into the court the $430,000 or its equivalent, plus certain additional money. (R. 106-107.) After MacKay spent 80 days in jail without paying a penny, the district court released him finding that, while his contempt had not been purged, continued incarceration would be punitive. (R. 109-110.) The plaintiffs then brought contempt proceedings against MacKay's alleged Texas accomplices – Currey, Johnson, D&K and the Bank – to attempt to recover these funds. (R. 111-335, 418-420.)

The Judgment Against Currey, Johnson And D&K

On December 2, 1983, the district court held an evidentiary hearing at which MacKay, Currey, Johnson and the president of the Bank testified. On December 9, 1983, the district court issued a written memorandum (R. 451-468) and orders (R. 469-472) holding Currey, Johnson and D&K in civil contempt for violating the TRO, PI and Order of Contempt, but exonerating the Bank. The district court imposed a compensatory fine against Currey of $103,500, plus attorneys' fees of $6,840.09 (R. 469-470, 539-540). This judgment was affirmed by the Fifth Circuit Court of Appeals, and Currey now seeks a writ of certiorari from this Court.

Plaintiffs' proof before the district court clearly and convincingly demonstrated that Currey was "in cahoots" with MacKay to violate the TRO, PI and Order of Contempt.

Currey's T-Note Was Proceeds From
The Fraud Upon The Waffenschmidts

The underlying fraud was perpetrated through a two-step transaction: the Waffenschmidts (1) purchased 55% of the stock of SFI for $3.3 million in cash paid March 19, 1982 and (2) purchased the remaining 45% of the stock of SFI for approximately $2.4 million in cash paid June 4, 1982. Of the approximately $2.4 million paid June 4, 1982, $1,792,547.34 was paid to MacKay and deposited to his account at the Merchants and Farmers Bank in Columbus, Mississippi. On June 7, 1982 MacKay wire-transferred $1 million of this money from the Merchants and

Farmers Bank to the Bank in Texas. (Tr.[2] 17, 23; R. 447.) MacKay then used these funds in Texas to buy certificates of deposit at various local Texas banks. (Tr. 17, 166-67, 170; R. 447.)

The certificates of deposit came due on September 1, 1982, at which time MacKay had the Bank wire-transfer one-half of the proceeds to the Central Bank of Birmingham to buy a single $500,000 United States Treasury Note ("T-Note"). (Tr. 19.)

On February 24, 1983 MacKay sold this $500,000 T-Note for a $43,000 profit and used the balance to purchase from the Central Bank of Birmingham five separate $100,000 T-Notes maturing November 15, 1983, each with two $3,500 coupons attached, one due May 15, 1983 and one due November 15, 1983. (Tr. 19-20; Ex.[3] 360.) As confirmed by certified mail receipts, these five T-Notes and coupons were not physically delivered to MacKay in Texas until March 18, 1983 (R. 571-572, 583), two days *after* the entry of the TRO prohibiting MacKay and his agents from transferring, encumbering or concealing the proceeds of the fraud upon the Waffenschmidts (R. 87).

Currey's Transparently False Story

Currey has told an incredible story about his acquisition from MacKay of one of the $100,000 T-Notes with one $3,500 coupon due November 15, 1983 based upon an oral understanding. The district court justifiably found Currey's story to be "fictitious and did not occur as narrated by Currey" (R. 456), which finding the Fifth Circuit affirmed.

Currey's story was that he had an alleged oral agreement with MacKay for MacKay to purchase the Holiday Inn in Mount Pleasant, Texas from Western Interests Corporation, a Texas corporation owned and controlled by Currey and his wife and children;

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[2] References designated "Tr." are to the transcript of the proceedings before the district court held on December 2, 1983 which is part of the Record on Appeal.

[3] References designated "Ex." are to exhibits admitted into evidence at the hearing before the district court on December 2, 1983 which are part of the Record on Appeal.

that MacKay delivered the T-Note and coupon to Currey sometime during the first ten days of March 1983[4] as escrow money for the purchase of the Holiday Inn, and that the T-Note and coupon were forfeited June 1, 1983 when MacKay purportedly failed to produce the balance of the purchase price of $2.6 million. (Tr. 64-65, 69; Currey dep.[5] 7-9.)

The Circumstances Demonstrating Currey's Story Is Untrue

However, Currey's testimony at the hearing and during his deposition demonstrates, as the district court found (R. 454-455), that Currey's story is fiction. Currey testified that there were no witnesses to this oral agreement other than MacKay and himself (Tr. 63); that there was no document, not even a letter, that in any way confirmed or corroborated the terms of this agreement (Currey dep. 9; Tr. 63); that he told no one else about the alleged agreement, not even his wife or children who were shareholders in the corporation that owned the Holiday Inn and were active in the business (Currey dep. 7, 17; Tr. 54-55, 59-61, 66-67); that he did not tell his banker about the agreement even though the bank was financing a substantial renovation of the hotel (Tr. 54, 83); that the structure of the alleged deal was never finalized, especially the cash to be paid by MacKay and whether MacKay was going to assume promissory notes held by Currey's relatives (Tr. 65-66; Currey dep. 19-20); that he had never dealt this way before, although he had previously sold a Holiday Inn in Paris, Texas for which he engaged a lawyer who drew a written contract (Tr. 61-63); that he did not know anything about MacKay's business (Currey dep. 27); that he did not do anything

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[4] The records of the Central Bank of Birmingham show that the T-Note with two coupons were mailed to MacKay in Texas and were received by his father Jack W. MacKay, Sr. on March 18, 1983 (R. 571-572, 583). This conclusively demonstrates that Currey was lying when he testified that he received the T-Note during the first ten days of March 1983.

[5] References designated "Currey dep." are to the transcript of Currey's deposition taken July 12, 1983 admitted into evidence at the hearing before the district court on December 2, 1983, which is part of the Record on Appeal.

to investigate MacKay's background or even ask him for a financial statement (Currey dep. 26; Tr. 70); and that MacKay did not even ask for an extension when the alleged June 1, 1983 forefeiture date arrived (Tr. 68).[6]

Thus the district court which saw Currey testify and had a full opportunity to assess his demeanor unquestionably was correct in finding:

> Currey's claim that he is entitled to the $103,500 as forfeit money for the failure of MacKay to perform by June, 1983 an oral agreement to purchase the Mount Pleasant Holiday Inn for $2,700,000 is incredible and not worthy of belief.

(R. 454.)

The Liquidation Of The T-Note And Coupon In Violation Of The District Court's Orders

Currey's testimony as to his subsequent liquidation of the T-Note and coupon demonstrates a cavalier disregard for the orders of the district court that justified holding him in contempt for acting in concert with, and as an agent for, MacKay to conceal the proceeds of the fraud.

Currey acknowledged that he had received, or had been aware through his attorney of the contents of, the TRO, PI and the Order of Contempt *before* he cashed the T-Note and coupon.[7] (Tr. 40,

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[6] The T-Note which Currey obtained from MacKay originally had two coupons attached—one due May 15, 1983 and one due November 15, 1983. The T-Note Currey had at the time of his deposition (Ex. 360) had only the November 15, 1983 coupon attached. It is a strong inference that Currey did not receive the T-Note until after May 15, 1983, and probably not until his June 1983 meeting with MacKay, which occurred after the entry of the PI. In fact, MacKay used the May 15, 1983 coupon, and others, contumaciously to borrow $15,000 from the Bank on April 15, 1983. (R. 105, 233; Tr. 194-195, 199, 201; Ex. 342.)

[7] Currey strangely had difficulty establishing the date he cashed the T-Note and coupon. At first, on November 30, 1983 his counsel served and filed an unsigned affidavit stating Currey still held the T-Note and coupon. (R. 428; Ex. 662.)

(footnote continued)

53-54.) Currey admitted on the witness stand that he had been informed by the Waffenschmidts' counsel that the T-Note and coupon were part of the proceeds of the fraud and that he was to deliver them to the Mississippi district court. (Tr. 29-30, 32, 36-37; R. 380-381, 383, 385-386.)

Instead, Currey ignored this direction and liquidated[8] the T-Note and coupon, which he conceded represented "an extraordinary amount of money" (Tr. 41-42). Yet, Currey did not recall the name of the person or the name of the company (perhaps Silver Smelters, Inc.) with which he dealt to liquidate this T-Note and coupon. (Tr. 42-43.) As to his specific purpose for liquidating the T-Note and coupon (prior to its maturity), he testified, "I was going to buy silver with it and changed my mind" (Tr. 48), and then claimed he needed the money to pay for renovations of the Holiday Inn (Tr. 54), for which he had arranged bank financing in June 1983 (Tr. 83).

Thus, the only conclusion from this testimony and the other facts presented, as the district court properly found and the Fifth Circuit correctly affirmed, is that Currey received from MacKay and cashed the $100,000 T-Note and $3,500 coupon "for the purpose of aiding and abetting a plan or scheme to violate the Court's injunctive orders issued before delivery of the treasury note and coupon." (R. 456.)

At the hearing, Currey produced a different signed affidavit stating he cashed the T-Note and coupon on October 1, 1983. (R. 433; Tr. 44-46; Ex. 661.) However, on the stand on December 2, 1983 Currey could not recall if he cashed the T-Note or coupon on October 1, 1983 or within thirty days of that date. (Tr. 41, 47-48.)

[8] However, Currey produced no documentation to support his claim that he had liquidated the T-Note.

SUMMARY OF THE ARGUMENT

Currey's petition for a writ of certiorari challenges basic assumptions about the powers of a federal court, and, if successful, would dramatically reduce the power of federal courts to enforce their orders.

It has long been established that:

(1) A federal court sits as a court of equity when issuing an injunction. See, *e.g.*, *Gompers v. Buck's Stove & Range Company*, 221 U.S. 418, 441, 31 S. Ct. 492, 498 (1911).

(2) The mandate of an injunction runs nationwide. See *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451, 52 S. Ct. 238, 240 (1932).

(3) An injunction binds not only the parties who violate it, but also those who aid and abet parties in violating the injunction. See *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9, 14, 65 S. Ct. 478, 481 (1945).

(4) Only the court which entered the injunction may enforce it through contempt. See *In re Debs*, 158 U.S. 564, 594-595, 15 S. Ct. 900, 910 (1895).

The Fifth Circuit, the district court and respondents here say these principles allowed the Mississippi district court to hold Currey in contempt for knowingly aiding MacKay in violating the TRO, PI and Order of Contempt.

Currey argues that only a court of law sitting in his home state of Texas through a trial by jury[9] could determine whether he aided MacKay in a violation of a Mississippi federal court's injunction. (Currey's Petition at 8-9.) In effect, Currey argues that each of

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[9] This Court in *Shillitani v. United States*, 384 U.S. 364, 365, 86 S. Ct. 1531, 1533 (1966), disposed of Currey's argument on this point in holding that, in "a civil contempt proceeding, ... indictment and jury trial are not constitutionally required."

the four propositions listed above is incorrect. Clearly, Currey's petition has no merit and should be denied.

Currey also attacks the Fifth Circuit's alternative holding that the Mississippi district court could have exercised jurisdiction over him under Mississippi's long-arm statute. However, Currey ignores the fact that his actions in Texas had foreseeable effects in Mississippi, which would justify asserting jurisdiction over him. See *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1007 (5th Cir. 1982).

In addition, as the above factual recitation demonstrates, Currey raises a non-issue (Currey's Petition at 10-11) with respect to *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952), and *Nishikawa v. Dulles*, 356 U.S. 129, 78 S. Ct. 612 (1958). *Nishikawa* does not stand for the rule "that on appellate review, the witness' testimony is to be disregarded" (Currey's Petition at 10), and there was more than ample evidence demonstrating that Currey violated the district court's orders. Currey received the T-Note from MacKay after the TRO was issued. He had no valid or believable explanation as to how he came to have it. In the face of having been served with the TRO, the PI and the Order of Contempt, Currey claimed he thereafter disposed of the T-Note and kept the proceeds, clearly violating the district court's orders.

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE FEDERAL DISTRICT COURT HAD INHERENT POWER TO HOLD CURREY IN CONTEMPT AS A THIRD PARTY KNOWINGLY AIDING A PARTY IN VIOLATING INJUNCTIVE ORDERS.

"[A] decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control. In essence ... defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9, 14, 65 S. Ct. 478, 481 (1945).

> It has been settled law for a long time that one who knowingly aids, abets, assists, or acts in active concert with, a person who has been enjoined in violating an injunction subjects himself to civil as well as criminal proceedings for contempt even though he was not named or served with process in the suit in which the injunction was issued or even served with a copy of the injunction. In re Lennon, 1897, 166 U.S. 548, 554, 17 S.Ct. 658, 41 L.Ed. 1110; Alemite Mfg. Corp. v. Staff, 2 Cir., 1930, 42 F.2d 832 and cases cited.

Reich v. United States, 239 F.2d 134, 137 (1st Cir. 1956), *cert. denied*, 352 U.S. 1004, 77 S. Ct. 563 (1957).

This common-law doctrine is embodied in Rule 65(d) of the Federal Rules of Civil Procedure, *United States v. Hall*, 472 F.2d 261, 267 (5th Cir. 1972), which states, in relevant part, that "[e]very ... restraining order ... is binding ... upon those persons in active concert or participation."

The mandate of an injunction runs nationwide, *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451, 52 S. Ct. 238, 240 (1932), and a "[v]iolation of an injunctive order is cognizable

[only] in the court which issued the injunction, regardless of where the violation occurred," *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963). Enforcement of an injunction through a contempt proceeding must be pursued in the issuing jurisdiction because "[c]ontempt has traditionally been viewed as an affront to the court issuing the order," *Bedgood v. Cleland*, 554 F. Supp. 513, 517 (D. Minn. 1982). Thus, regardless of where Currey resides, only the Mississippi district court had the "power to punish for a disobedience of [its] order[s]," *In re Debs*, 158 U.S. 564, 594, 15 S. Ct. 900, 910 (1895).[10]

Pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, and the common law doctrine from which it is derived, for the district court to adjudicate Currey in contempt of its orders, it was required to find that (1) he had actual notice of the orders said to be violated and (2) he had participated with MacKay in MacKay's contumacious conduct. See *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100, 112, 89 S. Ct. 1562, 1570 (1969); *Alemite Mfg. Corporation v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930); 11 Wright & Miller, *Federal Practice and Procedure*, §2965 (1973) at 563.

As described above, Currey admits to having notice of the TRO and PI on July 12, 1983 and of the Order of Contempt by September 2, 1983. Currey further admits that he was notified that the T-Note and coupon had been found by the district court to be proceeds from the fraud perpetrated upon the Waffenschmidts and were to be transferred to the clerk of the Mississippi district court as security for the judgment to be obtained by the Waffenschmidts. Nonetheless, Currey knowingly violated the TRO, PI and Order of Contempt in approximately October 1983 when he refused to transfer the T-Note and coupon to the clerk of the district court, but negotiated them and used the proceeds from that sale in some unknown manner.

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[10] Further, an injunction of a federal court cannot be enforced outside the court which issued it. An injunction is not registrable and enforceable in another court pursuant to United States Judicial Code §1963 (28 U.S.C. §1963). See *Stiller v. Hardman, supra; Bedgood v. Cleland, supra.*

In addition, in light of the uncontradicted documentary facts that MacKay did not receive the T-Note and coupon until after the entry of the TRO and Currey's T-Note was missing the May 15, 1983, but not the November 15, 1983, coupon, the district court was clearly justified in concluding that Currey's whole story about the initial transfer of the T-Note and coupon from MacKay before March 10, 1983 was a total fabrication and that therefore Currey was acting as MacKay's agent in receiving and secreting the proceeds from the fraud upon the Waffenschmidts. Thus, the two prerequisites to hold Currey accountable in the Mississippi district court – actual notice and assistance to MacKay – had been met.

Further, this dual requirement of actual notice plus actions which aid violations of the federal district court's orders, as held by the Fifth Circuit (see that portion of the Fifth Circuit's opinion reprinted in Currey's Petition at 5a-6a, 16a-18a), is sufficient to satisfy the constitutional requirement of due process of law under the *Fifth Amendment*.[a]

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[a] Currey's petition confuses the due process requirements under the Fourteenth Amendment as applied to state courts asserting jurisdiction over nonresidents, see *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945), with the due process requirements under the Fifth Amendment applied to a federal district court sitting in equity whose jurisdiction is nationwide.

> One fundamental principle of the Anglo-American law of jurisdiction is that a sovereignty has personal jurisdiction over any defendant within its territorial limits, and that it may exercise that jurisdiction by any of its courts able to obtain service upon the defendant. This principle has long been applied to the states under the due process clause of the Fourteenth Amendment.* * *
>
> What has frequently been overlooked is that this same basic principle has long been applied to the United States itself, so that the United States is deemed to have personal jurisdiction over any defendant within the United States. (Toland v. Sprague, 12 Pet. 300, 37 U.S. 300, 9 L.Ed. 1093; United States v. Union Pacific R. Co., 98 U.S. 569, 25 L.Ed. 143; Robertson v. Railroad Labor Board, 268 U.S. 619, 45 S.Ct. 621, 69 L.Ed. 1119; Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 66 S.Ct. 242, 90 L.Ed. 185.) Because of this oversight, and by analogy to the application of the basic

(footnote continued)

The Fifth Circuit found:

(1) Currey by knowingly violating the district court's orders could reasonably anticipate having to justify his actions to the Mississippi district court.

(2) Currey's inconvenience in litigating in a distant forum resulted from his own actions in violating the court's orders and was far outweighed by the inconvenience to the plaintiffs in having to commence plenary actions wherever the enjoined party and his agents chose to secrete funds and the heavy burden upon the judicial system by repetitious proceedings where the second court would have to retry the evidence leading to the injunctive orders.

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principle to the states, there is a line of cases apparently denying the validity of an exercise of personal jurisdiction by a federal court over a defendant present within the United States unless the defendant is also present (or "doing business," etc.) within the district in which the court is held. In other words, the restrictions of the Fourteenth Amendment upon state jurisdiction have been applied by these cases to federal jurisdiction. The anomaly here lies not only in overlooking the principle that the United States may exercise personal jurisdiction over any defendant within the United States, but also in limiting federal action by a constitutional provision applicable only to state action.

First Flight Company v. National Carloading Corporation, 209 F. Supp. 730, 736-737 (E.D. Tenn. 1962) (footnotes omitted except for portion of one footnote inserted in the first parentheses).

Rules 4(f) and 65(d) of the Federal Rules of Civil Procedure codify the nationwide jurisdiction of federal courts to enforce their orders. In addition, in this action, plaintiffs invoked the jurisdiction of the federal district court through section 22(a) the Securities Act of 1933 (15 U.S.C. §77v(a)) and section 27 of the Securities Exchange Act of 1934 (15 U.S.C. §78aa), each of which provides for nationwide service of process, even for pendent claims, see *Robinson v. Penn Central Company*, 484 F.2d 553, 556 (3d Cir. 1973).

(3) The Mississippi district court had a strong special interest in litigating the matter before it due to its "manifest need ... to protect and enforce its own judgments".[12]

These considerations clearly demonstrate that Fifth Amendment due process of law was not offended by the assertion of jurisdiction over Currey in the Mississippi federal district court.

Moreover, if Currey's argument were correct, federal injunctions would be almost meaningless pieces of paper. If a party enjoined in Mississippi were to retain an agent, such as a lawyer, across the state line in Louisiana, who does exactly what the enjoined defendant was prohibited from doing by a Mississippi district court, according to Currey, the Mississippi federal court would have no recourse against the nonparty Louisiana lawyer for the out-of-state defiance of its injunction. This is not, and never has been, the law.

II. THE FIFTH CIRCUIT'S ALTERNATIVE HOLDING THAT THERE WAS JURISDICTION OVER CURREY UNDER THE MISSISSIPPI LONG-ARM STATUTE IS ALSO CORRECT.

Currey's argument in this portion of his petition (at 12-14) appears to be that, because he took no actions in Mississippi, he may not be subject to Mississippi's long-arm statute. Currey ignores the following statement of Mississippi law by the Fifth Circuit (reprinted at 15a):

> Mississippi allows for service on nonresidents who commit acts outside the state with foreseeable effects resulting within the forum. *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1007 (5th Cir. 1982), *cited with approval in, First Mississippi National Bank v. S & K Enterprises of Jackson, Inc.*, 460 So. 2d 839, 843 (Miss. 1984).

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[12] Indeed, under the All Writs Act (28 U.S.C. §1651(a)), federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Once Currey had knowledge of the Mississippi district court's orders, every action he took in derogation of those orders had the foreseeable consequence of causing damage in Mississippi for which Currey would have to answer to the Mississippi court. "An order imposing a compensatory fine in a civil contempt proceeding is thus somewhat analogous to a tort judgment for damages caused by wrongful conduct," *Parker v. United States*, 153 F.2d 66, 70 (1st Cir. 1946), and it was therefore appropriate to uphold jurisdiction over Currey under the Mississippi long-arm statute.[13] See that portion of the Fifth Circuit's opinion reprinted in Currey's Petition at 18a-21a.

III. THERE WAS AMPLE EVIDENCE TO SUPPORT THE DISTRICT COURT'S JUDGMENT AGAINST CURREY.

Currey argues that there is a "rule" from *Nishikawa v. Dulles*, *356 U.S. 129, 78 S.Ct. 612 (1958)*, that, where there is a question of a witness' demeanor, "on appellate review, the witness' testimony is to be disregarded" (Currey's Petition at 10). Applying this "rule", Currey then argues that there is no evidence of his contempt. Not only is there no such "rule" from *Nishikawa*, but there is more than adequate evidence of Currey's contempt.

In *Nishikawa*, the issue was who had the burden of persuasion that an act of renunciation of citizenship was voluntarily performed. 356 U.S. at 133-134, 78 S.Ct. at 615-616. This Court held that it was the government's burden, and that it had not been met. 356 U.S. at 134, 137, 78 S.Ct. at 616, 617. In reaching this conclusion, this Court held only that "the district judge's disbelief of petitioner's story of his motives and fears [cannot] fill the evidentiary gap in the Government's case." 356 U.S. at 137, 78 S.Ct. at 617.

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[13] Currey's argument in footnote 15 that Rule 4(f) of the Federal Rules of Civil Procedure limits a federal court's civil contempt power to out-of-state locations within 100 miles of the courthouse was convincingly answered by the Fifth Circuit. See that portion of the Fifth Circuit's opinion reprinted in Currey's Petition at 13a-14a.

As described above, here there is documentary evidence that Currey, contrary to his testimony, could not have received the T-Note until after the entry of the TRO. Further, the T-Note itself only had attached the November 15, 1983 coupon and not the May 15, 1983 coupon when Currey received it from MacKay. This gives rise to a strong inference that Currey did not receive the T-Note from MacKay until after the entry of the PI. Further circumstantial support for this conclusion is that on April 15, 1983, MacKay (in violation of the TRO) pledged to the Bank five coupons to secure a loan of $15,000 due May 15, 1983. Thus, it appears that MacKay removed the coupons in April to secure a loan of $15,000 and, in June 1983 after the district court issued the PI, delivered the T-Note with its one remaining coupon to Currey for him to hold.

Moreover, there was evidence admitted by Currey that he received notice of the TRO and PI on July 12, 1983 at a time when he still held the T-Note and the coupon and that he was advised orally, in writing and in detail that the T-Note and coupon were proceeds from the fraud upon the Waffenschmidts, subject to the district court's orders, which proceeds were required to be deposited with the clerk of the Mississippi district court. Notwithstanding that knowledge, Currey further secreted and dissipated the proceeds from the T-Note and coupon in violation of those orders and the Order of Contempt.

When these facts are added to Currey's transparently false story as to how and when he came to hold the T-Note and coupon, the district court clearly was justified in finding "that Currey received the $100,000 treasury note and coupon from MacKay for the purpose of aiding and abetting a plan or scheme to violate the Court's injunctive orders". Reprinted in Currey's Petition at 35a.

CONCLUSION

For all the reasons stated above, this Court should deny Currey's petition for a writ of certiorari.

Dated: New York, New York
November 4, 1985

Respectfully submitted,

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I hereby certify that three true and correct copies of the foregoing Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were forwarded on November 4, 1985 by Federal Express, charges prepaid, to Mr. James Robertshaw, Esq., Robertshaw, Terney & Noble, 128 South Poplar Street, Greenville, Mississippi 38702, counsel for petitioner.

/s/

James Schreiber

Supreme Court, U.S.
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(3)

No. 85-601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PALMORE CURREY, II,
Petitioner,

v.

FREIDRICH WILHELM WAFFENSCHMIDT
and ANNA WAFFENSCHMIDT,
Respondents.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY ANALYSIS	1
ARGUMENT	2
I Application Of *Nishikawa*.	2
II Whether The District Court Had *Power* To Adjudicate The Respective Rights Of Petitioner, Over Whom It Lacked Personal Jurisdiction, And Respondents Is An Important Question Which Should Be Settled By This Court.	3
III Rebuttal.	6
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

CASES: Page

Dyer v. *MacDougall*, 201 F.2d 165 (2nd Cir. 1952) ... 3, 7

Heyman v. *Kline*, 444 F.2d 65 (2nd Cir. 1971) 4

Kline v. *Burke Construction Co.*, 260 U.S. 226 (1922) .. 6, 7

Nishikawa v. *Dulles*, 356 U.S. 129 (1958) 2, 3

Panther Pumps & Equipment Company, Inc. v. *Hydrocraft, Inc.*, 566 F.2d 8 (7th Cir. 1977) 5, 6

Stiller v. *Hardman*, 324 F.2d 626 (2nd Cir. 1963) 4, 5

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 4, 6

STATUTES:

Securities Act of 1933, § 22(a) 6

Securities Exchange Act of 1934, § 27 6

MISCELLANEOUS:

Supreme Court Rules, Rule 17 1

FRCivP, Rule 25 6

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PRELIMINARY ANALYSIS

Under Rule 17, Rules of the Supreme Court of the United States, it is clear that review on certiorari is directed to the sound judicial discretion of this Court and is granted only where there are important and specials reasons therefor. Petitioner relys on subparagraph (c) in seeking a review of the Court of Appeals' decision on an important question of federal law which has not been, but which should be decided by this

Court, and which conflicts with an applicable decision of this Court in *Nishikawa* v. *Dulles*.[1]

As we read respondents' Brief in Opposition to Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit ("Respondents' brief"), it is directed solely to the merits of the case. On this petition, the issue is not whether the Fifth Circuit was right or wrong, but whether there are questions of sufficient importance to justify review. We reserve reply to the argument on the merits.

Respondents' brief does, however, contain significant matters which buttress our *Nishikawa* argument and sharpens the precise issue we believe to be of sufficient importance for review.

ARGUMENT

I

Application Of *Nishikawa*.

On the question of contempt, the crucial question is whether petitioner had actual notice of the provisions of the TRO *at the time it was negotiated to him by MacKay*. His testimony on this point was that he knew only that MacKay had sold his farm in Mississippi and moved to Texas, that he had no knowledge of the details of the transaction, that he knew nothing of the pendency of the underlying action, and that he did not know and had never heard of the Waffenschmidts. [Transcript, 79-80]

As pointed out in Respondents' brief [7, 17], respondent first received notice of the TRO and PI on

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[1] 356 U.S. 129 (1958).

July 12, 1983, the day of his deposition. Their charge of contempt is based solely on the fact that *after* he received notice, respondent cashed the T-note in controversy. *Had* Currey taken the T-note from MacKay with actual notice of the TRO, it would be a different matter. There is simply *no* evidence he did have such notice at this crucial point, and certainly not any "clear and convincing" evidence (whatever that means) he accepted the T-note with actual knowledge of the TRO.

Since the entire opinion of the Fifth Circuit is bottomed on the assumption respondent, "with actual notice of the [district] court's order, . . . actively aid[ed] and abet[ted] a party [MacKay] in violating that order" [Appendix 2a], it necessarily applied the rule of *Dyer* v. *MacDougall*,[2] and it also necessarily follows that both the District Court and the Court of Appeals adopted the opposite of respondent's testimony cited above.

Thus, *Nishikawa* has a direct bearing upon the issues in this case.

II

Whether The District Court Had *Power* To Adjudicate The Respective Rights Of Petitioner, Over Whom It Lacked Personal Jurisdiction, And Respondents Is An Important Question Which Should Be Settled By This Court.

It is undisputed that petitioner claimed the T-note was his property. He cashed it and used the proceeds in the renovation of the Holiday Inn. Rightly or wrongly, he claimed an independent interest in the instrument.

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[2] 201 F.2d 165 (2nd Cir. 1952).

If petitioner had acquired title to the T-note, then his refusal to surrender it could not be a violation of the TRO or PI, and could not constitute a contempt.

The District Court specifically found

> "Currey and Johnson are residents of Mount Pleasant, Texas. D & K Motor Sports, Inc., is a Texas corporation owned by Johnson. * * * None of the respondents has transacted business or owned assets within the State of Mississippi which would subject them to the in personam jurisdiction of this Court."

Appendix, 33a.

The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the claimant. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969); cf.: *Heyman* v. *Kline*, 444 F.2d 65 (2nd Cir. 1971). Lacking personal jurisdiction over petitioner, the District Court could not adjudicate ownership of the T-note on July 12, 1983, and had no basis for contempt.

The Fifth Circuit's research has uncovered no cases which explicitly discuss whether a court may exercise jurisdiction over a non-party who knowingly aids and abets a violation of a court's orders but lacks other contacts with the forum. [Appendix, 8a]

Our research has produced cases only peripherally touching the point. In *Heyman, supra,* the district court had jurisdiction over the husband under a long-arm statute, but lacked jurisdiction over the wife. The Second Circuit held the district court could not issue an injunction requiring the wife to surrender an option in which she claimed a half interest. *Stiller* v.

Hardman, 324 F.2d 626 (2nd Cir. 1963), involved an attempt to register a judgment for damages and injunctive relief rendered by a Ohio district court against Squeeze-a-Purse Corporation in a patent infringement case, seeking to enjoin the corporation and its privies (the principal stockholder and chief supplier) from further infringement. The Second Circuit noted that the Ohio court had held it was without jurisdiction over the alleged privies (an unreported decision). [324 F.2d at 627] We speculate that the privies had transacted no business in Ohio which would subject them to the court's jurisdiction. *Stiller* permitted the money judgment to be registered, but refused to enforce the injunctive provisions.

In *Panther Pumps & Equipment Company, Inc.* v. *Hydrocraft, Inc.,* 566 F.2d 8 (7th Cir. 1977), suit for patent infringement was brought against Hydrocraft and two of its three officers. Beck, the third officer, was not a party. When it became apparent Hydrocraft was going to lose the suit, Beck bought out the other two, and shipped virtually all the assets from Illinois to Ohio where they wound up in his new, wholly owned corporation, Universal Spray Systems, Inc. ("Universal"). In the original action, the court awarded damages and enjoined Hydrocraft, "its divisions, subsidiaries, *officers,* agents, servants and assigns * * * directly or indirectly" from further infringement. [566 F.2d at 11. Emphasis is in reported case.] Panther Pumps moved for an order directed to Beck and Universal to show cause why they should not be held in contempt for violation of the injunctive provisions, and to add or substitute Beck and Universal as defendants. The district court issued a show cause order *only* to Beck. Although the Seventh Circuit held Uni-

versal was the alter ego of Beck (and presumably a "privy"), it further held,

> "The motion to substitute Universal faces an insurmountable obstacle: lack of personal jurisdiction."

566 F.2d at 23,

citing *Hazeltine, supra.* We think *Panther Pumps* stands for the proposition that a non-party may not be added as a defendant under Rule 25, FRCivP, or enjoined where, as appears from the facts of the case, it was an Ohio corporation not otherwise subject to the jurisdiction of the district court. We must agree that the opinion is cloudy and that the question is not as directly presented as it is here.

III

Rebuttal.

Respondents seem to suggest [Respondents' brief, p. 13, fn. 11] that the United States can exercise personal jurisdiction over any defendant within the United States, pointing out that they invoked jurisdiction in the district court under § 22(a) of the Securities Act of 1933 and § 27 of the Securities Exchange Act of 1934, each of which provides for nationwide service of process, even for pendent claims. The difficulty with that argument is that petitioner had no participation whatsoever in the fraud which is the basis of the underlying action, there is no claim of a securities violation against him, and there is nothing to which personal jurisdiction over him can "append".

The lower federal courts have only such jurisdiction as Congress chooses to bestow, within the limits of the Constitution. *Kline* v. *Burke Construction Co.,* 260

U.S. 226 (1922). No authority is needed for the proposition that, once a court acquires personal jurisdiction over a party, that jurisdiction may be exercised wherever that party may be. Congress has given nationwide jurisdiction in the areas of securities law, bankruptcy, etc., but not to enforce injunctions against non-parties. We equate "jurisdiction" with "power to act"; if a court lacks jurisdiction, it lacks power to enforce, be it an injunction, or any other order.

CONCLUSION

We have no difficulty with nationwide jurisdiction over a *party* who violates a court's order. We submit the question of a court's power to enforce its order against a *non-party* not otherwise subject to its jurisdiction, and the question of the basic unfairness of the *Dyer* v. *MacDougall* rule in the context of this case, are both "cert-worthy".

Respectfully submitted,

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I certify that three true and correct copies of the foregoing instrument were forwarded via United States mail, postage prepaid, to James Schreiber, Esq., SCHWARTZ, KLINK & SCHREIBER, 666 Third Avenue, New York, NY 10017, counsel of record for respondents, and to Phillip N. Cockrell, Esq., HUBBARD, PATTON, PEEK, HALTOM & ROBERTS, 700 Texarkana National Bank Building, Texarkana, AR 75501, counsel for cross-respondent.

Dated this ____ November, 1985.

J. ROBERTSHAW